Supreme Court, U.S.
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No. 96-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

IN RE THE HONORABLE THOMAS L. STEFFEN, CHIEF JUSTICE, NEVADA SUPREME COURT, and THE HONORABLE CHARLES E. SPRINGER, ASSOCIATE JUSTICE, NEVADA SUPREME COURT,
Petitioners

Petition for a Writ of Mandamus or Prohibition or, in the Alternative, a Writ of Certiorari to the Supreme Court of the State of Nevada

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PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION OR, IN THE ALTERNATIVE, FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the nationwide system of justice governed by the Fourteenth Amendment's Due Process Clause can "permit[] a court's decision to stand when a disqualified judge casts the deciding vote." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 827-28 (1986).

PARTIES TO THE PROCEEDING AND RELIEF SOUGHT

A. Parties: Petitioners, the Honorable Thomas L. Steffen, Chief Justice of the Nevada Supreme Court, and the Honorable Charles E. Springer, Associate Justice of the Nevada Supreme Court, seek a writ of prohibition or mandamus directed to the Honorable C. Clifton Young, Associate Justice of the Nevada Supreme Court, and the Honorable Robert Rose, Associate Justice of the Nevada Supreme Court. Sup. Ct. R. 14(b). Additional parties to these proceedings include Frankie Sue Del Papa, Nevada Attorney General; the Honorable David Zenoff, Senior Justice of the Nevada Supreme Court; Herbert J. Ahlswede, Special Master; the Nevada Commission on Judicial Discipline; and the Honorable Jerry Carr Whitehead, Nevada District Court Judge (Retired).

B. Relief Sought: Petitioners seek an order (1) vacating a July 12, 1996 Mandamus Order issued by two disqualified members of the Nevada Supreme Court and (2) directing the two disqualified justices of that court, Associate Justice C. Clifton Young and Associate Justice Robert Rose, to refrain from taking any further action that purports to modify the relief granted by the Nevada Supreme Court in a matter in which they are recused, including interfering with or blocking the appointment of any replacement judges necessary to finally dispose of the matter. Sup. Ct. R. 20(3).

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IN THE

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IN RE THE HONORABLE THOMAS L. STEFFEN, CHIEF JUSTICE, NEVADA SUPREME COURT, and THE HONORABLE CHARLES E. SPRINGER, ASSOCIATE JUSTICE, NEVADA SUPREME COURT,

Petitioners

Petition for a Writ of Mandamus or Prohibition or, in the Alternative, a Writ of Certiorari to the Supreme Court of the State of Nevada

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PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION OR, IN THE ALTERNATIVE, FOR A WRIT OF CERTIORARI

Ten years ago, this Court declared that it was "aware of no case, and none has been called to our attention, permitting a court's decision to stand when a disqualified judge casts the deciding vote." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 827-28 (1986). In this extraordinary case, two members of the Nevada Supreme Court—after recusing themselves from considering the merits of a challenge to state judicial disciplinary procedures—have reentered the case and effectively "cast[] the deciding vote" (*id.*) by issuing a writ of mandamus against their own bench. Petitioners, the Honorable Thomas L. Steffen, Chief Justice of the Nevada Supreme Court, and the Honorable Charles E. Springer, Associate Justice of the Nevada Supreme Court, respectfully request this Court to issue an extraordinary writ vacating the July 12, 1996

Mandamus Order of the two recused justices. In the alternative, Petitioners request that the Court grant a writ of certiorari to review the disputed order.

OPINIONS BELOW

The Mandamus Order signed by two recused justices of the Nevada Supreme Court (App. A 1a) is reported at 920 P.2d 489. That Order reaffirms an earlier unreported administrative order dated September 15, 1995 (App. B 7a) and an opinion dated April 25, 1996 (App. F 110a) reported at 915 P.2d 245. The decisions of the Nevada Supreme Court vacated in whole or in part by the Mandamus Order of the recused justices (App. C 9a; App. E 92a) are reported at 878 P.2d 913 and 908 P.2d 219. The Mandamus Order also vacates an opinion (App. G 133a) reported at 920 P.2d 491.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1651(a) or, in the alternative, 28 U.S.C. § 1257. The Mandamus Order that is the subject of this Petition was issued July 12, 1996.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

U.S. Const., amend. XIV.

STATEMENT

This unusual case, involving a startling disregard of fundamental judicial procedure, presents "exceptional circumstances" that "warrant the exercise of the Court's

discretionary powers." Sup. Ct. R. 20(1). As the challenged Mandamus Order notes, this "matter has made a lasting, albeit hardly noble, imprint upon Nevada's judicial history." App. A 1a. By ignoring the most elemental requirements of due process to decide a case they are disqualified to adjudicate, the Respondent members of the Nevada Supreme Court have heaped ignominy upon the State's judicial system. The nationwide system of justice governed by the Fourteenth Amendment's Due Process Clause cannot permit such a "decision to stand." *Aetna Life Ins. Co., supra*, 475 U.S. at 828.

This matter arose when Nevada District Court Judge Jerry Carr Whitehead filed a petition for a writ of prohibition with the Nevada Supreme Court against the Nevada Commission on Judicial Discipline (hereafter, "*Whitehead*"). In *Whitehead*, the Nevada Supreme Court entered final judgments interpreting the Commission's procedural rules and granting various forms of relief to Judge Whitehead. Although two members of the Nevada Supreme Court and the Nevada Attorney General were disqualified from participating in the case, these individuals eventually nullified significant *Whitehead* judgments. This was accomplished by means of an original writ petition filed by the Attorney General against the members of the Nevada Supreme Court who decided *Whitehead*, including Petitioners Chief Justice Thomas L. Steffen and Associate Justice Charles E. Springer. The Attorney General's petition, which sought to vacate a substantial portion of the rulings and relief entered in *Whitehead*, was granted by the two disqualified justices (joined by the lone dissenting member of the *Whitehead* panel). At issue, therefore, is whether the United States Constitution tolerates the disregard by a state supreme court or any of its justices of the basic due process command that judges, once recused, are thereafter powerless to affect the outcome of the same case in which they are disqualified. *Aetna Life Ins. Co., supra.*

This Petition seeks an order (1) vacating the July 12, 1996 Mandamus Order issued by the two disqualified members of the Nevada Supreme Court and (2) directing the two disqualified justices of that court, Associate Justice C. Clifton Young and Associate Justice Robert Rose, to refrain from taking any further action that purports to modify the relief granted by the Nevada Supreme Court in *Whitehead*, including interfering with or blocking the appointment of any replacement judges necessary to finally dispose of the matter. Sup. Ct. R. 20(3). Because Justices Young and Rose have ignored all efforts by the Nevada Supreme Court to prevent their unconstitutional interference with a case in which they are recused and therefore disqualified to act, the relief sought "is not available in any other court." *Id.*

1. In 1993, Judge Jerry Carr Whitehead filed a petition for mandamus with the Nevada Supreme Court. He alleged that the Nevada Commission on Judicial Discipline, which had been investigating him, had exceeded its jurisdiction and failed to abide by its own rules. Among his claims were allegations that the Commission had failed to adhere to confidentiality procedures imposed by the Nevada Constitution. App. G 136a. Nev. Const., art. 6, § 21(5) ("[t]he supreme court shall make appropriate rules for . . . [t]he confidentiality of all proceedings before the commission . . ."); Rule 5(1), Administrative and Procedural Rules for the Nevada Commission on Judicial Discipline ("[a]ll proceedings must be kept confidential until there has been a determination of probable cause and a filing of formal statement of charges"). Judge Whitehead asserted that, although Nevada law required pre-probable cause proceedings to be confidential, "the integrity of the whole judicial discipline process [had been] endangered by what appear to be almost routine 'leaks' of judicial disciplinary proceedings." App. C 25a. Judge Whitehead's complaint was solidly grounded: the American Bar Association ("ABA") recommends that judicial disciplinary proceedings be conducted in con-

fidence prior to a finding of probable cause and this recommendation is generally followed throughout the Nation.[1]

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[1] The ABA's Model Rules for Judicial Disciplinary Enforcement provide that, prior to the "filing and service of formal charges," "all proceedings" and "all information" relating to a judicial disciplinary matter "shall be confidential." Model Rule 11(A)(1), (B)(1), Model Rules for Judicial Disciplinary Enforcement. A "formal charge," in turn, is filed only after a "full investigation" demonstrates "reasonable cause to believe the judge committed misconduct." Model Rule 17(D)(1)(c), 17(D)(2)(c), Model Rules for Disciplinary Enforcement *Accord* ABA Standards Relating to Judicial Discipline and Disability Retirement § 4.6 (1978) ("[a]ll proceedings should be confidential until there has been a determination of probable cause and formal charges have been filed").

The ABA recommendation has been implemented in all fifty states and the District of Columbia. Twenty-two states mandate pre-probable cause confidentiality of judicial disciplinary proceedings. Nineteen states "maintain confidentiality until formal proceedings have resulted in a finding of misconduct and a recommendation for discipline is filed with the highest state court, while the remaining ten commissions [including the District of Columbia] maintain confidentiality until the state Supreme Court actually orders discipline." Jeffrey M. Shaman, et al., *Judicial Conduct and Ethics* § 13.15 (1995). *See e.g.*, Ark. Judicial Disc. and Disability Comm. Rules, Rule 7 (1996) ("Investigatory records, files, and reports of the Commission shall be confidential, and no disclosure of information, written, recorded, or oral, received or developed by the Commission in the course of an investigation relating to alleged misconduct or disability of a judge, shall be made . . ."); Colo. Rules of Jud. Disc., Rule 6 (1996) ("All papers and pleadings filed with and proceedings before the commission, . . . shall be confidential until the commission files a recommendation with the Supreme Court for the removal, retirement, suspension, censure, reprimand or discipline of a judge . . ."); Conn. Gen. Stat. § 51-511(a) (1993) (providing for confidentiality of investigations to evaluate "whether or not there is probable cause" that improper conduct has occurred); *In the matter of Rowe*, 566 A.2d 1001 (Del. Ct. Judiciary 1989) (*quoting* Del. Constitution., art. IV, § 37) ("All hearings and other proceedings of the Court on the Judiciary shall be private, and all records except a final order of removal or retirement shall be confidential . . . ."); Fla. Constitution. of 1968, art. V, § 12(d) (1994) ("Until formal charges against a justice or judge are filed by the commission with the clerk of the Supreme

Two members of the Nevada Supreme Court, Justices Rose and Young, as well as the Nevada Attorney General,

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Court of Florida all *proceedings* by or before the commission shall be confidential . . ."); Ga. Rules of Jud. Qualifications Comm., Rule 20 (1996) ("The proceedings of the Commission, including, but not limited to, complaints filed with the Commission, conferences of the Commission with respect to matters pending before it, minutes of actions and decisions of the Commission, correspondence and other communications, and all other papers and documents shall be kept confidential"); Haw. Sup. Ct. Rules, Rule 8 (1996) ("All proceedings involving allegations of misconduct . . . of a judge shall be kept confidential until and unless the Supreme Court enters an order for the imposition of public discipline or the judge requests that the matter be public"); Idaho Jud. Council Rules, Rule 24 (1996) ("All papers filed with and proceedings before the Council . . . shall be confidential until a record is filed by the Council in the Supreme Court"); Ill. Const. art. VI, § 15(c) ("All proceedings of the [judicial investigatory] Board shall be confidential except the filing of a complaint with the Courts Commission"); Iowa Code Ann. tit. XV ch. 602 R. 5 (West 1996) ("[A]ll records, papers, proceedings, meetings, and hearings of the commission shall be confidential" prior to a decision to retire, discipline, or remove a judge); La. Judiicary Comm. Rule 10, La. Rev. Ann. § 8 (West 1996) ("Every effort shall be made by members of the Commission to keep confidential the fact that a complaint has been made or that an investigation is taking place"); Md. Const. art. 4 § 4B(a) ("All proceedings, testimony, and evidence before the Commission shall be confidential"); Mass. Gen. Laws Ann. 211C § 5 (West 1996) (explaining that the Commission on Judicial Conduct must, upon receipt of a complaint, "conduct a prompt, discreet and confidential inquiry"); Mich. Constitution of 1963, art. VI, § 30 (1996) ("The Supreme Court shall make rules . . . providing for confidentiality and privilege of proceedings"); Minn. Bd. Jud. Stds. Rule 6(b) (1996) ("Upon receipt of a complaint as to conduct that might constitute grounds for discipline, the [board] shall conduct a prompt, discreet, and confidential evaluation"); Miss. Const. § 177A ("all proceedings before the commission shall be confidential, except upon unanimous vote of the commission. After recommendation of removal or public reprimand of any justice or judge is filed with the supreme court, the charges and recommendations of the commission shall be made public"); Mo. Sup. Ct. Rules, Rule 12.21 (1995) (requiring that proceedings before the Commission on Retirement, Removal and Discipline be confidential until a recommendation for discipline is filed with the supreme court); Mont.

Frankie Sue Del Papa, had conflicts of interest and accordingly were disqualified from participating in the case.

Constitution. art. VII, § 11 ("The proceedings of the commission are confidential except as provided by statute"); Neb. Const. art. V § 30(5) ("All papers filed with and proceedings before the commission or masters appointed by the Supreme Court pursuant to this section prior to a reprimand or formal open hearing shall be confidential"); N.J. Rules of Court, Rule 2:15-20 (1996) ("The record before the Committee shall be confidential and shall not be available to any person except in the proper discharge of official duties"); N.M. Constitution. art. VI, § 32 ("All papers filed with the commission . . . and proceedings before the commission . . . are confidential"); N.Y. Jud. Law § 45 (McKinney 1996) ("[A]ll complaints, correspondence, commission proceedings and transcripts thereof, other papers and data and records of the commission shall be confidential . . . ."); N.C. Gen. Stat. § 7A-377(a) (1995) ("[A]ll papers filed with and proceedings before the Commission, including any preliminary investigation which the Commission may make, are confidential . . . ."); *Judicial Qualifications Comm'n v. Schirado*, 364 N.W.2d 50, n.1 (N.D. 1985) (*quoting* N.D. Constitution. art. VI, § 12) ("The Supreme Court shall make rules . . . providing for confidentiality of proceedings"); Pa. Const. art. V, § 18(a)(8) ("All proceedings of the board shall be confidential except when the subject of the investigation waives confidentiality"); R.I. Sup. Ct. R. art. VI, Rule 4.3 (1995) ("All records and information obtained and maintained by the Committee concerning judicial performance shall be confidential and shall not be disclosed except in accordance with this Rule"); S.C. App. Ct. Rules, Rule 502 (1996) ("Prior to the issuance of an Order by the Supreme Court directing the suspension, [or] discipline, . . . no member of the Commission or its staff, members of the Court, witnesses, or any other person shall disclose the existence or contents of the investigation or proceedings nor any testimony taken nor the papers filed therein unless otherwise directed by the Court"); Tex. Const. of 1876, art. V, § 1a(10) (1995) ("All papers filed with and proceedings before the Commission . . . shall be confidential"); Va. Code Ann. § 2.1-37.13 (Michie 1996) (same); Vt. Rules for Disc. Control of Judges, Rule 6 (1995) ("All papers, files transcripts and communications in proceedings before the Board before filing of a formal charge shall be confidential"); Wash. Comm. on Jud. Conduct Rules, Rule 292-08-050 (1995) ("[T]he fact that a complaint has been made, or a statement has been given to the commission and all papers and matters submitted to the commission together with the investigation and initial proceedings conducted pursuant

App. E 92a; App. G 148a.[2] Two judges were thereafter appointed to fill the vacancies on the *Whitehead* panel. App. G 134a.

2. On July 26, 1994, the Nevada Supreme Court issued an opinion that ordered the Commission to comply with the confidentiality requirements established under the Nevada Constitution in the course of future investigations. App. C 26a. Among other things, the Nevada Supreme Court concluded that, to avoid the "[p]remature exposure of meritless complaints against judges" that "would make it appear that our judges were guilty of rampant misconduct and would threaten the independent function of the judiciary," the "people of this State . . .

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to these rules, shall be confidential"); Wis. Stat. Ann. § 757.93 (West 1996) ("All proceedings . . . relating to misconduct . . . prior to the filing of a petiton or formal complaint by the commission are confidential . . . ."); Wyo. Jud. Supervisory Comm. Rules, Rule 7 (1995) ("All papers filed with and proceedings before the commission shall be confidential").

[2] Justice Rose was disqualified from sitting on the *Whitehead* petition because, at the time the petition was before the Nevada Supreme Court, he had been "secretly recorded by the police as telling the district attorney that he would 'love' to see the criminal charges pending against two friends, one a business associate, 'go away.'" App. G 162a-63a n.12. Justice Rose recused himself after Judge Whitehead filed a motion to disqualify the justice on the ground that the secret meeting with the district attorney "at least arguably" placed Justice Rose "in a position of jeopardy with . . . the Discipline Commission." *Id.* Justice Young was disqualified because he served on the Judicial Discipline Commission during the very period of time in which Judge Whitehead alleged that the Commission had violated the Nevada Constitution and the Commission's own rules. *Id.*

The Attorney General, for her part, was disqualified because one of the contentions in the *Whitehead* matter was that the Attorney General had improperly served as a prosecutor before the Judicial Discipline Commission. App. C 20a, 28a. *Accord,* ABA Standards Relating to Judicial Discipline and Disability Retirement, Standard 2.8 (use of attorney general staff to prosecute or discipline judges "is not recommended" because such conduct may "interfere with the independence of the judiciary").

mandated the confidentiality of judicial discipline proceedings in our fundamental law, the Nevada Constitution." App. C 26a-27a. Accordingly, the court concluded that, prior to a determination of probable cause, judicial disciplinary proceedings must not be publicly disclosed. In reaching this conclusion, the supreme court expressly rejected the contention that "this court lacked the authority to enforce" the confidentiality requirements of the Nevada Constitution and rebuffed as well the argument "that the First Amendment prevents this court from requiring the Commission to enforce its own confidentiality rules." App. C 27a n.15. These rulings brought Nevada law in line with ABA recommendations and judicial disciplinary procedures adopted by the majority of states. Note 1, above.

As part of the relief granted, the Nevada Supreme Court concluded that a special master should be appointed to investigate who was responsible for the contemptuous breaches of confidentiality. App. C 28a. The court reasoned that:

> [i]t is most apparent that someone must get to the bottom of these flagrant constitutional infractions. At this stage of the proceedings we are not prepared, as a court, to launch a full investigation into these matters . . . . We do, however, conclude that an investigation into the breaches of confidentiality is warranted. A master will have to be appointed having power to issue subpoenas and other compulsory process. In due time the court will issue an order naming the court master or other investigator and defining the scope of the powers and duties that will be necessary to carry out the required investigation.

App. C 27a-28a. One of the original members of the court (Justice Shearing) dissented from the appointment of the special master. App. C 54a. The special master (with one member of the Nevada Supreme Court dissenting) was appointed September 1, 1995. App. D 85a.

3. In a deposition taken September 2, 1995, the special master discovered that the Attorney General's office and at least two members of the Nevada Supreme Court, among others, were suspected of divulging confidential information regarding the complaint against Judge Whitehead. App. H 212a, 237a, 238a.[3]

4. On September 15, 1995, the two disqualified members of the court, Justices Rose and Young, convened a special administrative panel and, together with Justice Shearing (who dissented from the appointment of the special master), issued an "administrative order" vacating the appointment of the special master. App. B 7a. The disqualified justices and the *Whitehead* dissenter asserted that "the appointment of a special master/prosecutor and concomitant expenditure of funds serves no legitimate purpose and amounts to a gross waste of this court's limited resources." App. B 8a. The disqualified justices therefore "declare[d] void" the order appointing the special master and "prohibit[ed] the payment of any cost or expenditure associated with the appointment of said special master/prosecutor." *Id.*

5. On December 15, 1996, the Nevada Supreme Court issued a *per curiam* opinion vacating the "administrative order." App. E 95a. The court concluded that, because Justices Rose and Young had recused themselves from *Whitehead*, they had no authority to declare (among other things) that the appointment of the special master served "no legitimate purpose." App. B 8a. According to the

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[3] The Interim Report filed by the special master reported:

> 1. My investigation discloses what appears to have been an intentional and knowing disclosure of confidential matters relating to the *Whitehead* matter before the Judicial Discipline Commission.
>
> 2. My investigation to date reveals that this disclosure may involve members of a law firm, at least two members of the Supreme Court and the attorney general's office. . . .

App. E 106a.

Nevada Supreme Court, there was "no need to cite legal authority for the proposition that disqualified justices are not empowered to alter the formal adjudications made by the court in this case." App. E 95a. As a result, the Nevada Supreme Court concluded that "[t]he order signed by Justices Young, Shearing and Rose, filed on September 15, 1995, which declares certain judgments and orders of this court to be 'void,' is hereby adjudged to be a nullity and of no legal force or effect." *Id.*

6. In response to the above action by the Nevada Supreme Court, on December 21, 1995, the Attorney General (who, like Justices Rose and Young, had been disqualified from participating in *Whitehead*), filed an original petition for mandamus in the Nevada Supreme Court. The Attorney General's petition, filed under the caption *Del Papa v. Steffen* (hereafter *Del Papa* petition), named as Respondents the special master and every member of the *Whitehead* panel except Justice Shearing, who had dissented from the appointment of the special master. App. F 110a. In her petition, the Attorney General asked the court to vacate the confidentiality rulings issued by the Nevada Supreme Court in *Whitehead* and set aside the appointment of the special master. *Id.*

7. Between the appointment of the special master and the filing of the *Del Papa* petition, two members of the *Whitehead* panel became unable to serve (one retired, the other was required to attend to a close family member who was ill). App. G 135a, 172a. On December 20, 1995, Chief Justice Steffen submitted a request to the governor asking him to appoint two replacement judges to the *Whitehead* panel. App. G 139a. Before the governor appointed replacement judges, Justices Rose and Young (who had been disqualified in *Whitehead*) and Justice Shearing (who had dissented), issued an order on December 28, 1995, requiring a majority of the elected members of the supreme court to approve any temporary appointments to the court. App. G 174a. Thereafter, these

three justices refused to permit organization of a full bench for disposition of remaining matters in the *White head* case.

8. After effectively preventing replacements to the *Whitehead* panel, the disqualified and dissenting justices issued an opinion reversing a substantial portion of the rulings and relief entered in *Whitehead*. They did so by issuing a *per curiam* opinion on April 25, 1996, that purported to dispose of the Attorney General's *Del Papa* petition. App. F 110a. The disqualified justices, in reliance upon the jurisdictional and First Amendment arguments rejected by the Nevada Supreme Court in *Whitehead* (App. C 27a n.15), concluded that "[t]he State Constitution and the [Administrative Rules for the Nevada Commission on Judicial Discipline] provide no authority for confidential proceedings before the supreme court itself, and the *Whitehead* panel erred in concluding that it had such authority." App. F 120a. Accordingly, the disqualified and dissenting justices vacated the confidentiality rulings in *Whitehead* and ordered the Nevada Supreme Court to "cease and desist from any further action in the [*Whitehead*] investigation." App. F 132a.

9. In response to this opinion by the two disqualified justices and the *Whitehead* dissenter, and unable to reconstitute a full bench or quorum because of the new appointment rules imposed by the same justices, Chief Justice Steffen and Justice Springer—the only remaining members of the *Whitehead* panel—reluctantly issued a two-justice opinion on July 5, 1996. App. G 133a-86a. Noting that the disqualified and dissenting justices had apparently "achieved 'checkmate' " by reversing *Whitehead* rulings while at the same time preventing replacements to the *Whitehead* panel, Chief Justice Steffen and Justice Springer stated they had considered simply permitting "the three justices to bring this unfortunate matter to a dishonorable close in the hope that time might heal the gangrenous wounds to Nevada's judicial system." App. G

140a. "[H]onor and respect for the rule of law and judicial ethics," however, did not allow this result (*id.*):

> whether judges are entitled to confidentiality until there has been a finding of probable cause and whether serious contempts of this court should be followed up or ignored are, of course, issues which have already been decided by this court and are the law of the case. Such are not, obviously, matters which are subject to interference by the *disqualified* judges, Young and Rose. The issue presented is whether Justices Young and Rose, who were disqualified from acting in this case, have the power, directly or indirectly, to overrule the judgments of the court in this case. They do not have such power, accordingly, all actions of Justices Young and Rose that affect in any way the judgments of the court in this case are declared to be void . . . .

App. G 137a. The July 5, 1996, opinion expressly declared that this result was demanded by the Due Process Clause. App. G 134a.

10. On July 12, 1996, Justices Rose, Young, and Shearing filed the disputed Mandamus Order. Regardless of the due process obligation to refrain from deciding *Whitehead*, the disqualified justices reaffirmed their April 25, 1996, reversal of that opinion. App. A 5a. The justices concluded that the Nevada Supreme Court's orders in *Whitehead* were "based on the false premise that certain aspects of judicial discipline were confidential and that the Supreme Court could act in secret with regard thereto." App. A 3a. Citing as precedent—not any authoritative opinions by the state's highest court—but only their own April 25, 1996, opinion reversing the Nevada Supreme Court's confidentiality rulings in *Whitehead*, the disqualified and dissenting justices held that "the Nevada Supreme Court has no authority to impose a veil of secrecy over judicial disciplinary proceedings in the manner employed." App. A 3a (citing App. F 118a-20a).

The disqualified and dissenting justices, therefore, vacated the appointment of the special master and further ordered the clerk of the court not to accept any new filings in *Whitehead*. App. A 5a.[4]

REASONS FOR GRANTING THE PETITION

Mandamus and prohibition, as recognized by the Rules of this Court, are extraordinary writs issued as a matter "of discretion sparingly exercised." Sup. Ct. R. 20(1). As a general rule, such writs (issued by a superior to an inferior tribunal) are appropriate to control only the most egregious abuses of judicial power.[5] This case is one of

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[4] The July 12 Mandamus Order asserted that the investigation by the special master lacks "any possible vestige of impartiality" because the master's fees had been paid with the personal funds of Chief Justice Steffen and Justice Springer. App. A 3a. This assertion is seriously misleading: it was the presumptuous orders of the disqualified justices—not any effort to exert influence over the investigation—that necessitated the payment to the special master. After the special master had been appointed and had already completed substantial work, the disqualified justices directed the Administrative Office of the Nevada Supreme Court to withhold payment. App. G 168a. Rather than "allow the further erosion of the honor of this court by denying the special master payment for services *already rendered*, and for which payment had been expressly authorized by lawful order of the court," and to avoid placing the Administrative Office of the Nevada Supreme Court in the untenable position of ignoring either the order of the Nevada Supreme Court or the contrary order of the disqualified justices, the Chief Justice and Justice Springer paid the special master directly. App. G 169a (emphasis in original). The payment totaled $1,450, with Chief Justice Steffen and Justice Springer each paying half "in order to honor this court's obligation pursuant to the order of appointment." *Id.*

[5] *Allied Chem. v. Daiflon Inc.*, 449 U.S. 33, 35 (1980) ("[E]xceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of [mandamus]"); *Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964) (petition for mandamus is appropriate where there is a "substantial allegation of usurpation of [judicial] power"); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943) ("The traditional use of the writ in aid of appellate

those rare occasions where the Court should exercise its discretion to remedy a raw disregard of the fundamental demands of due process.

Initially, it is important to recognize the questions that this Petition *does not* present. Despite the contrary arguments contained in the Mandamus Order entered by the two disqualified justices and the *Whitehead* dissenter, this Petition *does not* present the question whether the confidentiality rulings of the Nevada Supreme Court and the appointment of the special master in *Whitehead* were "extra-jurisdictional in nature." App. A 2a. Similarly, the Petition *does not* involve whether the special master's investigation was "unprecedented." *Id.* Nor does the Petition implicate whether the "appointment of the special master was an exercise of extra-constitutional power that was void upon its inception." *Id.* at 3a. The Petition *does not* involve any inquiry into whether an investigation by the special master is "a judicial witch hunt." *Id.* Finally, the Petition *does not* present the question whether the Nevada Supreme Court (like the majority of state courts in the nation, note 1, above) has the "authority to impose a veil of secrecy over judicial disciplinary proceedings." *Id.* The Nevada Supreme Court has already concluded that it has the jurisdiction and constitutional authority to appoint the master, that an investigation into contemptuous breaches of court procedures is neither unprecedented nor a witch hunt, and that the Nevada Constitution—far from forbidding the relief ordered in

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jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so"). Writs of mandamus are also granted in instances where, as here, a party has no other avenue for seeking relief. *See Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394, 403 (1976) (mandamus is sometimes available where "the party seeking the issuance of the writ [has] no other adequate means to attain the relief he desires").

Whitehead—compels the "veil of secrecy" (*id.*) derided by the disqualified justices. App. C 26a-27a. These issues, having already been decided by the full court, "are the law of the case." App. G 137a.

What *is* presented by this Petition, therefore, is whether two disqualified justices of the Nevada Supreme Court, after the full court has already rejected their jurisdictional and constitutional positions, may declare that the full court's actions are unauthorized and that the court "erred in concluding that it had such authority." App. F 120a. The answer to that question, moreover, is clear: once judges are recused from considering the merits of a matter, they may not thereafter alter the outcome of that case. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 827-828 (1986). Even assuming (as the disqualified justices contend) that the full Nevada Supreme Court erred in asserting jurisdiction or construing the state constitution, correction of any such errors does not lie with disqualified jurists. As this Court has already affirmed, "we are aware of no case, and none has been called to our attention, permitting a court's decision to stand when a disqualified judge casts the deciding vote." *Id.*, 475 U.S. at 827-828. The Court should issue a writ of mandamus or prohibition to remedy the obvious disregard of due process disclosed by this record.

I. THE CHALLENGED ORDER MODIFIES THE RELIEF GRANTED IN *WHITEHEAD*

Undoubtedly aware of the unassailable due process demand that, once recused, judges may not thereafter affect the outcome of a case (Section II, below), the Mandamus Order states that "the undersigned majority have in no way attempted to amend, restrict or change" the relief granted in *Whitehead*. App. A 2a. This submission, however, is refuted by the very face of the Mandamus Order.

Among the questions before the Nevada Supreme Court in *Whitehead* was whether the Nevada Constitution man-

dated that judicial disciplinary hearings, prior to a finding of probable cause, be conducted in confidence and, if so, whether the extraordinary pre-probable cause disclosures involving Judge Whitehead should be investigated and remedied. A full and properly constituted panel of the Nevada Supreme Court, with Justice Shearing dissenting, concluded not only that the Nevada Constitution mandated confidentiality but that the contemptuous breaches of that obligation in *Whitehead* demanded judicial investigation and cure.

As the court explained (App. C 25a-26a):

> The argument of some is, of course, that judges are no different from any other public official and that if any allegations of misconduct are made by anyone, such charges should immediately be open to the public. The counterargument (and the one adopted by the framers of the Nevada Constitution) is that the judiciary depends to a large degree for its effectiveness on the trust and confidence that the people place in that institution's ability to render, day-to-day, fair and impartial decisions. By its very nature, the judiciary deals with disputes that often leave litigants or counsel with negative or agitated feelings. As a result, many complaints may be generated and sent to the Commission about judges that are entirely without merit. If all of these unfounded complaints were available to the public and the media, without any inquiry into their substance, public esteem for the judiciary as a whole would suffer, thus making it more difficult for the one branch of government that should be a safe haven for the impartial and fair resolution of disputes, to inspire public confidence in the integrity of judicial proceedings.

Accord authority cited at note 1, above.

The court, therefore, concluded that (App. A 26a-27a):

> [w]hichever side of this argument one might want to espouse, the fact remains that, at present, all com-

> plaints against judges must, as commanded by the Nevada Constitution, and by the rules of this court enacted in accordance with the direct command of the Constitution, remain confidential until there has been a finding of probable cause and a formal statement of charges has been filed as a public document. Despite the voices of those who [minimize] the seriousness of breaches of confidentiality, we are unable to arrogate to ourselves a superior wisdom or authority than the people of this State who mandated the confidentiality of judicial discipline proceedings in our fundamental law, the Nevada Constitution.

In reaching the above conclusions, the full court expressly rejected the argument that "this court lacked the authority to enforce these constitutional provisions, and that the First Amendment prevents this court from requiring the Commission to enforce its own rules." App. A 27a n.15. The full court, furthermore, concluded that, because of the serious breaches of confidentiality involved in *Whitehead*, "[i]t is most apparent that someone must get to the bottom of these flagrant constitutional infractions." App. A 27a. And, because it was "clear that we have the authority to appoint a fact-finding master to delve into the source of the violations," the court concluded that a master would thereafter be appointed to investigate the "breaches of confidentiality that occurred in these proceedings and the extent to which they may have impacted Petitioner's [*i.e.*, Judge Whitehead's] due process rights." *Id.* at 27a-28a.

In light of the foregoing, it is simply disingenuous for the disqualified justices to assert in their Mandamus Order that they "have in no way attempted to amend, restrict or change" the relief granted by the full court in *Whitehead*. App. A 2a. In *Whitehead*, the Nevada Supreme Court concluded that—in line with ABA recommendations and judicial disciplinary procedures followed throughout the Nation (note 1, above)—the Nevada Constitution mandated pre-probable cause confidentiality. App. C 26a-

27a. The disqualified justices, by contrast, and citing only themselves, ruled that "the Nevada Supreme Court has no authority to impose a veil of secrecy over judicial disciplinary proceedings." App. A 3a. The Nevada Supreme Court concluded that it was "most apparent" that the breaches of confidentiality in *Whitehead* should be judicially investigated. App. C 27a. The disqualified justices, by contrast, and invoking only the jurisdictional arguments rejected by the full court (*id.* at 27a n.15), concluded that any investigation was "extra-jurisdictional." App. A 2a. The Nevada Supreme Court, finally, concluded that "we have the authority to appoint a fact-finding master to delve into the source of the violations." App. C 27a. The disqualified justices, by contrast, and again invoking already-rejected First Amendment arguments (*id.* at 27a n.15), ruled that "appointment of the special master was an exercise of extra-constitutional power that was void upon its inception." App. A 3a.

In these circumstances, and despite their protests, it is quite clear that the disqualified justices have entered an Order that "amend[s], restrict[s] or change[s]" the rulings and relief entered in *Whitehead*. App. A 2a. The question remains whether the Due Process Clause permits such a result. The answer is "no."

II. DISQUALIFIED JUDGES MAY NOT AFFECT THE OUTCOME OF THE VERY CASE IN WHICH THEY ARE DISQUALIFIED TO ACT

Perhaps the most basic requirement of due process is that a litigant must receive "a fair trial in a fair tribunal." *In re Murchison*, 349 U.S. 133, 136 (1955); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927). "Every procedure which would offer a possible temptation to the average man . . . not to hold the balance nice, clear, and true" denies constitutional due process. *Tumey*, 273 U.S. at 532. As a result, "a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned." *Gay v. United States*, 411 U.S. 974, 975

(1973) (quoting Canon 3(1)(B) of the Code of Judicial Conduct).[6] Justice Rose and Justice Young appropriately recused themselves from consideration of the *Whitehead* petition. Note 2, above. The same constitutional command that required their recusal now demands that they not be permitted effectively to amend the outcome in *Whitehead*.

This Court declared, ten years ago, that it was "aware of no case" that "permit[ted] a court's decision to stand when a disqualified judge casts the deciding vote." *Aetna Life Ins. Co., supra*, 475 U.S. at 827-828. There have been no such cases in the intervening decade. All federal courts that have addressed the issue have held that disqualified judges may *not* participate in any case in which they have recused themselves.[7] All state courts addressing

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[6] Even the appearance of judicial bias should trigger recusal. *In re Murchison*, 349 U.S. at 136. In fact, due process can even require recusal of judges who have no actual bias and "who would do their very best to weigh the scales of justice equally between contending parties." *Aetna Life Ins. v. Lavoie*, 475 U.S. 813, 825 (1986). *Accord Del Vecchio v. Illinois Dep't of Corrections*, 31 F.3d 1363, 1371 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1404 (1995) ("judges sometimes must recuse themselves when they face possible temptations to be biased, even when they exhibit no actual bias"). *See also* American Bar Association, Canon 3(E)(1), *Model Code of Judicial Conduct* (1990).

[7] *El Fenix de Puerto Rico v. The M/Y Johanny*, 36 F.3d 136, 142 (1st Cir. 1994) (once a judge enters a recusal order, that order should not even be reconsidered by the judge); *United States v. Moody*, 977 F.2d 1420, 1423 (11th Cir. 1992), *cert. denied*, 507 U.S. 944 (1993) ("Mandamus is thus the proper remedy to vacate the orders of a judge who acted when he should have recused"); *In Re School Asbestos Litigation*, 977 F.2d 764, 776 (3d Cir. 1992) (mandamus is appropriate "when a district judge continues to sit despite previously having expressed the intent to disqualify himself or herself"); *Moody v. Simmons*, 858 F.2d 137, 143 (3d Cir. 1988) ("Once a judge has disqualified himself, he or she may enter no further orders in the case"); *New York City Hous. Dev. Corp. v. Hart*, 796 F.2d 976, 979 (7th Cir. 1986) ("[T]he position that provides the greatest measure of safety for the judicial system as a whole is one that vacates all decisions taken after the filing of

the issue have agreed.[8] Once disqualified from a particu-

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a justified motion to disqualify a judge . . . ."); *United States v. Widgery*, 778 F.2d 325, 328 (7th Cir. 1985) (holding that a court will void all acts made after a judge should have disqualified himself); *Arnold v. Eastern Air Lines*, 712 F.2d 899, 904 (4th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984) ("Patently a judge who is disqualified from acting must not be able to affect the determination of any cause from which he is barred."); *McCuin v. Texas Power & Light*, 714 F.2d 1255, 1261 (5th Cir. 1983) ("To permit a disqualified chief judge to select the judge who will handle the case in which the chief judge is disabled would violate the congressional command that the disqualified judge be removed from all participation in the case"); *In Re Cement Antitrust Litigation*, 673 F.2d 1020, 1024-25 (9th Cir. 1982) (stating that a disqualified judge is only authorized to perform ministerial duties such as assigning the case to another judge); *Ellentuck v. Klein*, 570 F.2d 414 (2d Cir. 1978) ("[I]t is clear that under New York law, if a judge is disqualified, that disqualification strips the court of subject matter jurisdiction"); *Stringer v. United States*, 233 F.2d 947, 948 (9th Cir. 1956) (after disqualification, judges may perform only the "mechanical duties of transferring the case to another judge or other essential ministerial duties short of adjudication"); *Rohrbach v. AT&T Nassau Metals Corp.*, 915 F. Supp. 712, 716 (M.D. Pa. 1996) (after disqualification, judges may perform only the simple duties associated with transferring the case); *Application of Scott*, 379 F. Supp. 622, 624 (S.D. Tex. 1974) (following recusal, judge may enter only ministerial orders such as transferring case to another jurist); *see also Laird v. Tatum*, 409 U.S. 824 (1972) ("Those federal courts of appeals which have considered the matter have unanimously concluded that a federal judge has a duty to sit where not disqualified *which is equally as strong as the duty to not sit where disqualified*") (emphasis added).

[8] *Johnson v. Sturdivant*, 758 S.W.2d 415 (Ark. 1988) (Arkansas Supreme Court sets aside its own decision after one justice recused from the case); *Gubler v. Comm'n on Judicial Performance*, 688 P.2d 551, 567-68 (Cal. 1984) (stating that once disqualified, a judge may not even offer advice to other judicial officers on how to dispose of the case); *Beckord v. District Court*, 698 P.2d 1323, 1330 (Colo. 1985) (*en banc*) (holding that once a judge has disqualified himself he is without jurisdiction to rule in any subsequent matters); *Johnson v. District Court*, 674 P.2d 952, 957 (Colo. 1984) ("We hold that the respondent judge abused his discretion by refusing to disqualify himself. The order denying the motion for a change of venue is vacated because the respondent judge had no

authority to rule on the matter"); *Bolt v. Smith*, 594 So. 2d 864, 864 (Fla. App. 1992) ("[F]lorida case law is well settled that once a trial judge has recused himself, further orders of the recused judge are void and have no effect"); *Margulies v. Margulies*, 528 So. 2d 957, 960 (Fla. App. 1988) ("[O]nce a trial judge disqualifies himself, he may not 'requalify' himself on removal of the reason for disqualification"); *Rogers v. State*, 341 So. 2d 196, 196 (Fla. App. 1976) ("Once the trial judge recused himself, further orders of his were void and of no effect"); *Butler v. Biven Software*, 473 S.E.2d 168, 170 (Ga. Ct. App. 1996) ("By the nature of [the judge's] recusal, any actions following his recusal or after he should have recused himself are naturally void"); *State v. Evans*, 371 S.E.2d 432, 433 (Ga. Ct. App. 1988) ("A disqualified judge can take no judicial action in the case and any attempt at such action is a mere nullity"); *People v. Langford*, 616 N.E.2d 628, 632 (Ill. App. Ct. 1993), *appeal denied*, 624 N.E.2d 812 (1993) ("If a motion for automatic substitution is improperly denied, all action by the trial court subsequent to the improper denial is void"); *Henderson v. State*, 647 N.E.2d 7, 10 (Ind. Ct. App. 1995) ("[The judge] had previously recused himself from the case and thus was not qualified to reassume jurisdiction"); *Thacker v. State*, 563 N.E.2d 1307 (Ind. Ct. App. 1990) (holding that a judge had no authority after he disqualified himself); *Vacura v. Harr's Equip.*, N.W.2d 387, 393 (Minn. 1985) ("[A]fter a judge has removed himself from a case, he may not issue an order which relates to the merits"); *Ferguson v. Pony Express Courier*, 889 S.W.2d 128, 130 (Mo. Ct. App. 1995) ("[A] judge who disqualifies himself or who has been disqualified by one of the parties has no further right to hear the case"); *Johnson v. Mehan*, 731 S.W.2d 887, 888 (Mo. Ct. App. 1987) ("Once a change of judge has been entered and the case transferred to another judge the disqualified judge has no further authority in the case and any orders made after the disqualification are void"); *Byrd v. Brown*, 613 S.W.2d 695, 699-700 (Mo. Ct. App. 1981) (holding that, after judge's disqualification, all orders made thereafter are void); *Blaisdell v. Rochester*, 609 A.2d 388, 391 (N.H. 1992) (voiding all subsequent rulings that were based on findings by a judge who should have been disqualified); *Pueblo of Laguna v. Cillessen & Son, Inc.*, 682 P.2d 197, 199 (N.M. 1984) ("Since the district court was properly disqualified, it had power only to perform mere formal acts subsequent to the disqualification"); *In the matter of Risovi*, 429 N.W.2d 404 (N.D. 1988) (holding that the orders signed by the judge after he was disqualified are void); *Longhini v. Bishop*, 901 P.2d 962, 965 (Or. Ct. App. 1995) ("As a general rule, a judge who has

lar case, judges are restricted to the "ministerial duties" of transferring the case to a different judge.[9]

The Mandamus Order entered by the disqualified justices is hardly ministerial. Rather, by holding that the Nevada Supreme Court "has no authority to impose a veil of secrecy over judicial disciplinary proceedings" (App. A 3a) and by decreeing that the appointment of the special master constitutes an "unconstitutional investigation[]" (*id.*), the disqualified justices have "cast[] the deciding vote[s]" (*Lavoie*, 475 U.S. at 827-828) on what the disqualified justices themselves describe as crucial "jurisdictional" and "constitutional" issues. App. A 2a-3a. These actions undeniably violate the clear limits set

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been disqualified from a particular case is without authority to act further in any judicial capacity in that case"); *State v. Nossaman*, 666 P.2d 1351, 1355 (Or. Ct. App. 1983) ("A judgment entered by a judge who has been disqualified in the manner prescribed in the statute is void"); *Degarmo v. State*, 922 S.W.2d 256, 267 (Tex. Ct. App. 1996) ("If a judge is disqualified under the constitution, he is absolutely without jurisdiction in the case, and any judgment rendered by him is void and subject to collateral attack"); *McElwee v. McElwee*, 911 S.W.2d 182, 186 (Tex. Ct. App. 1995) ("If a judge is disqualified under the Texas Constitution, he is without jurisdiction to hear the case, and therefore, any judgment he renders is void and a nullity"); *Chilicote Land Co. v. Houston Citizens Bank & Trust*, 525 S.W.2d 941, 943 (Tex. Ct. App. 1975) (ruling that, once disqualified, the judge was "incapacitated from taking action in the cause which required the exercise of judicial discretion").

[9] *Stringer*, 233 F.2d at 948; *El Fenix*, 36 F.2d at 141 ("As a general rule, a trial judge who has recused himself should take no other action in the case other than the necessary ministerial acts to have the case transferred to another judge"); *In re Aetna Casualty and Sur. Co.*, 919 F.2d 1136, 1145 (6th Cir. 1990) ("[E]ven a judge who has recused himself ought to be permitted to perform the duties necessary to transfer the case to another judge."); *see also* 13A Charles A. Wright, et al., *Federal Practice and Procedure* § 3550 (1984) ("If the judge concludes that he is disqualified he should take no further action in the case except the necessary ministerial acts to have the case transferred to another judge").

by the Due Process Clause. *Lavoie*, 475 U.S. at 827-828. Even if the substantive merit of the confidentiality rulings of the Nevada Supreme Court in *Whitehead* were arguable (App. A 4a) (disqualified justices assert that the *Whitehead* rulings are "folly") (*but cf.* authority collected in note 1), that so-called "folly" may be resolved by only one means: not by the disqualified justices, but by the Nevada Supreme Court.

III. THIS EXTRAORDINARY CASE DEMANDS RELIEF

The Petitioners, the sitting Chief Justice and an Associate Justice of the Nevada Supreme Court, candidly acknowledge the extraordinary nature of this case. "As far as we have been able to ascertain, the action of the [disqualified] justices is without precedent in the annals of American jurisprudence." App. G 149a. The Honorable Justices of this Court, moreover, may well be hesitant to enter into a dispute that (as even the disqualified justices acknowledge) has "resulted in a serious loss of prestige and respect for the [Nevada] judicial system and invited strong criticism from observers both in and out of the state." App. A 4a. However, the novelty and notoriety of this case counsel—not its disregard—but its proper (and constitutionally mandated) disposition. This case involves " 'the right of the public to a properly constituted . . . court.' " *Chandler v. Judicial Council*, 398 U.S. 74, 117 (1970) (Harlan, J., concurring) (quoting *United States v. Malmin*, 272 F. 785, 792 (3d Cir. 1921)). Hence, it is " 'essential' " that this Court issue the requested writ so that " 'orderly proceedings' " in Nevada will " 'be restored.' " *Id.*

In *United States v. Malmin*, 272 F. 785 (3d Cir. 1921), the Governor of the Virgin Islands had ousted a properly appointed district court judge, replacing him with a judicial officer of the Governor's own choosing. The court of appeals issued a writ of mandamus directing the properly appointed federal district judge to resume his post. The court reasoned that mandamus was the appro-

priate remedy because the case involved "the right of the public to a properly constituted trial court" and, without issuance of the writ, "orderly proceedings in the District Court of the Virgin Islands" could not "be restored." 272 F. at 792. Identical reasoning mandates an identical result in this case.

Mandamus lies "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). This extraordinary relief is appropriate when a lower court has transgressed constitutional limits.[10] Here, the disqualified justices should be directed to conform their conduct to the unquestionable norm established by the federal Due Process Clause. *In Re School Asbestos Litigation*, 977 F.2d 764, 776 (3d Cir. 1992) (mandamus is appropriate to prevent a district judge from sitting after previously expressing "the intent to disqualify himself or herself"); *United States v. Moody*, 977 F.2d 1420, 1423 (11th Cir. 1992) ("Mandamus is thus the proper remedy to vacate the Orders of a judge who acted when he should have recused"). That direction should include a command to vacate their July 12, 1996 Mandamus Order, as well as instructions to refrain from interfering in any manner with the appointment of any replacement judges necessary to finally dispose of *Whitehead. McCuin v. Texas Power & Light*, 714 F.2d 1255, 1261 (5th Cir. 1983) (concluding that a recused federal judge may not participate in the selection of his or her replacement).

The disqualified justices have argued that their Mandamus Order will restore public confidence in a beleaguered state judicial system. App. A 4a. The disqualified

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[10] *E.g., Allied Chem. v. Daiflon Inc.*, 449 U.S. 33, 35 (1980) ("[E]xceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of [mandamus]"); *Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964) (mandamus is appropriate where there is a "substantial allegation of usurpation of [judicial] power").

justices' disregard of the fundamental limits set by the Due Process Clause, however, can hardly reinvigorate public confidence but will rather (in the disqualified justices' own words) "do further irreparable damage[] to the prestige of the Nevada Supreme Court, both in and out of the state." *Id.* Unless this Court acts, it will be painfully obvious to every citizen residing in (and without) the State of Nevada that, notwithstanding the Fourteenth Amendment's command that state judicial systems operate within the boundaries set by "due process of law" (U.S. Const. amend. XIV), Nevada judges are free to determine the merits of cases they are disqualified to decide. The Nevada judicial system will retain (at best) merely the appearance of constitutionally mandated impartiality because it will be obvious to all involved that—should a recused judge or justice disapprove of a substantive result —that jurist can re-enter a lawsuit to redetermine its outcome. The nationwide system of justice governed by the Due Process Clause cannot tolerate this mockery of the bedrock principle of judicial neutrality.

This Court, as well as every other federal and state court that has addressed the issue, has unambiguously declared that—once disqualified—judges may not thereafter affect the outcome of a case. Notes 7-8, above. Petitioners respectfully request this Court's assistance in enforcing this basic command of the United States Constitution so that the process of restoring public confidence in the impartiality of a badly battered state judicial institution can begin. There is no entity other than this Court that can enforce the unambiguous dictates of the Due Process Clause here. Sup. Ct. R. 20; App. A 5a (Mandamus Order directs Clerk of the Nevada Supreme Court to refuse all further filings in *Whitehead*).

CONCLUSION

The petition for a writ of mandamus or prohibition should be granted. The Court should vacate the July 12, 1996 Mandamus Order of the disqualified justices (App. A 1a) and direct the disqualified justices, Justice C. Clifton Young and Justice Robert Rose, to refrain from taking any further action modifying the relief granted by the Nevada Supreme Court in *Whitehead*, including any actions interfering with the appointment of any necessary replacement judges. Sup. Ct. R. 20(3); *McCuin, supra*, 714 F.2d at 1261.

In the alternative, the Court should issue a writ of certiorari to review the July 12, 1996 Mandamus Order.

Respectfully submitted,

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OCTOBER 7, 1996

Supreme Court, U.S.
FILED
OCT 7 1996
OFFICE OF THE CLERK

No. 96-541

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

IN RE THE HONORABLE THOMAS L. STEFFEN, CHIEF JUSTICE, NEVADA SUPREME COURT, and THE HONORABLE CHARLES E. SPRINGER, ASSOCIATE JUSTICE, NEVADA SUPREME COURT,
Petitioners

Petition for a Writ of Mandamus or Prohibition or, in the Alternative, a Writ of Certiorari to the Supreme Court of the State of Nevada

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APPENDIX TO PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION OR, IN THE ALTERNATIVE, A WRIT OF CERTIORARI

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APPENDIX A

[Filed Jul. 12, 1996]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 27847

NEVADA ATTORNEY GENERAL,
FRANKIE SUE DEL PAPA,
Petitioner,

vs.

THE HONORABLE THOMAS L. STEFFEN, CHIEF JUSTICE OF THE NEVADA SUPREME COURT; THE HONORABLE CHARLES E. SPRINGER, JUSTICE OF THE NEVADA SUPREME COURT; THE HONORABLE DAVID ZENOFF, SENIOR JUSTICE OF THE NEVADA SUPREME COURT, in their official capacities, and HERBERT J. AHLSWEDE, in his official capacity as Special Investigator,
Respondents.

PETITION FOR AN ORDER RESCINDING APPOINTMENT OF SPECIAL MASTER ENTERED SEPTEMBER 1, 1995, AND VOIDING ASSOCIATED EXPENSES

Response to Supplemental Opinion filed July 5, 1996, under case number 24598.

OPINION

PER CURIAM:

It can hardly be gainsaid that the *Whitehead* matter has made a lasting, albeit hardly noble, imprint upon Nevada's judicial history with nearly 700 pages of opin-

ions and apparently the court's longest oral argument—approximately five hours. Moreover, the recent Supplemental Opinion filed under case number 24598 seems to lay the foundation for its continuing existence with the invocation by Justices Steffen and Springer of the rule of necessity and the inherent powers of the court. They argue these principles permit them (although two in number) to (1) write a "Per Curiam" Opinion overriding a majority order of the duly elected justices in a case where Justices Steffen and Springer were parties; and (2) act to bind the *Whitehead* panel, a panel consisting of five positions.[1]

Having reviewed the two-justice "Per Curiam" Opinion, the records, and files in this matter, we conclude:

(1) That a number of new "factual" allegations are included in the two-justice "Per Curiam" Opinion based on facts not in the record and that other allegations are of doubtful probity. However, in view of our disposition here, we perceive no need to address these and thereby add further to the enormous number of pages now on file.

(2) That the *Whitehead* panel gave to petitioner Whitehead the original relief sought in his petition for extraordinary relief and that the undersigned majority have in no way attempted to amend, restrict or change that relief.

(3) That any action of the *Whitehead* panel after granting petitioner the original relief sought in his petition was extra-jurisdictional in nature.

(4) That after granting the relief sought as stated above and after motions by Judge Whitehead, the *Whitehead* panel then sought to launch an unprecedented in-

---

[1] When Chief Justice Steffen's term expires at the end of 1996, Justice Springer will be the last of the four members of the *Whitehead* panel who once comprised the majority (Steffen, Springer, Guy and Zenoff). Under the rule of necessity, Justice Springer as sole remaining "functional member" could presumably supervise the work of the special master, Herbert J. Ahlswede, and file additional "Per Curiam" Opinions signed only by himself.

vestigation into the source of certain alleged leaks and to determine the reasons for the loss of confidence in the court and a decline in public support of the court. According to the order, the special master would report only to the *Whitehead* panel.

(5) That the appointment of the special master was an exercise of extra-constitutional power that was void upon its inception.

(6) That the above broad investigation would make possible a judicial witch hunt with the special master authorized to search for reasons why the Nevada Supreme Court has lost respect and prestige. According to the order creating the position, the special master is cloaked with judicial immunity and his activities are to be supervised only by the panel. Such a situation would place investigatory (i.e., executive) power and adjudicative power into the hands of a panel of this court, thereby presenting a situation which this court has previously disallowed because it would permit the panel to act oppressively. *See* Attorney General v. Steffen, 112 Nev. ——, ——, 915 P.2d 245, 252 (1996). Furthermore, the special master's fees were paid from the personal funds of Justices Steffen and Springer, thereby removing from the investigation any possible vestige of impartiality.

(7) That the purpose of the special master is to look for the person or persons allegedly responsible for violating orders of the panel based on the false premise that certain aspects of judicial discipline were confidential and that the Supreme Court could act in secret with regard thereto. It has been established that the Nevada Supreme Court has no authority to impose a veil of secrecy over judicial disciplinary proceedings in the manner employed. *Id.* at ——, 915 P.2d at 248-49.

(8) That the *Whitehead* panel had been informed before the special master was selected that there was no money in the Supreme Court budget for such activity. The panel was advised that it should seek money from

the legislature in 1995 or go to the Interim Finance Committee for needed funds. Apparently no such requests were submitted or efforts made.

(9) That the actions of the *Whitehad* panel, although perhaps sincerely taken, have unfortunately resulted in a serious loss of prestige and respect for the judicial system and invited strong criticism from observers both in and out of the state. The continued efforts of the two remaining members of the majority of the *Whitehead* panel to recklessly pursue the suspect goals set forth in the order appointing the special master will do further irreparable damages to the prestige of the Nevada Supreme Court, both in and out of the state.

(10) That while there is a rule of necessity recognized by some courts and this court has certain inherent powers, this rule and these powers do not serve in this case to override NRS 2.140, which disallows fewer than three justices to pronounce judgment in a case. Moreover, there is a stronger countervailing "Rule of Necessity" that the court must get on with its regular business and not conduct unconstitutional investigations as pursued by the *Whitehead* panel. The court now has a backlog of nearly 1,800 cases; and although the members are working with diligence, the backlog is growing by almost two cases a day. Simply put, the court and State of Nevada cannot enjoy the luxury or folly of pursuing the phantom leaker, if one exists. In line with public sentiment, we find that the *Whitehead* matter should be forever closed and relegated to the history books, rather than be further added to the already overburdened annals of Nevada's judicial records. We can best discharge our judicial responsibilities and at the same time enhance the respect for the court by single-mindedly devoting our energy and resources to promptly rendering decisions and improving judicial processes.[2]

---

[2] For over twenty years a priority goal of the Nevada Supreme Court has been to create an intermediate appellate court system

Accordingly, IT IS HEREBY ORDERED AS FOLLOWS:

(1) We incorporate by reference our former order of September 15, 1995, declaring void each and every provision of the "Order Appointing Special Master" which was filed by the *Whitehead* panel on September 1, 1995, and direct the Clerk of this court to strike as void the Supplemental Opinion filed July 5, 1996, under case number 24598 and further not to publish said Supplemental Opinion;

(2) We direct the Clerk of this court to accept no filings in case number 24598 or case number 27847 unless approved by a majority of the elected members of the court.

(3) We direct that Special Master Herbert J. Ahlswede is discharged and shall immediately return to the Clerk of the court (1) any subpoenas or subpoenas duces tecum issued by the Clerk of this court on September 1, 1995, and not served, and (2) inform the court immediately of the names, addresses, and dates of service of those upon whom service of subpoena has been made.

---

to provide relief from the crushing burden of ever-increasing appeals. To create an intermediate appellate court, the Nevada Constitution must be amended. The procedure to accomplish this is to have approval of the legislature in two successive sessions after which the proposal is submitted to a vote of the people.

On seven occasions, the Nevada Legislature has approved such a constitutional amendment, the last time in 1993. If the 1995 legislature had given its approval, the proposal to amend the Constitution would have been submitted to the voters in 1996. However, the 1995 Legislature was apparently so disenchanted with the actions of the *Whitehead* panel that it refused to process for the requisite second time the joint resolution for the intermediate appellate court. As a result of the failure of the Nevada Assembly to bring the joint resolution out of committee, the court will have go to the Nevada Legislature again in 1997 and in 1999. If approved by the voters in the year 2000, the court must go to the legislature in 2001 for funding. Thus, it will be the year 2002 at the earliest before such an intermediate court will be functional.

/s/ Young, V.C.J.
YOUNG

/s/ Shearing, J.
SHEARING

/s/ Rose, J.
ROSE

APPENDIX B

[Filed Sep. 15, 1995]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

ADKM No. 221

PETITION FOR AN ORDER RESCINDING APPOINTMENT OF SPECIAL MASTER ENTERED SEPTEMBER 1, 1995, AND VOIDING ASSOCIATED EXPENSES

ORDER GRANTING PETITION AND VACATING ORDER APPOINTING SPECIAL MASTER

On September 7, 1995, the undersigned petitioned the elected justices of this court to review actions taken by a panel constituted to hear and decide the matter of Whitehead vs. Nevada Commission on Judicial Discipline, Docket No. 24598. Our petition was prompted by the panel's issuance of an order, signed by only two of the elected justices of this court, appointing a special master/prosecutor, and directing the expenditure of public funds to facilitate the special master/prosecutor's activities. This order was entered by a majority of the panel constituted to hear and decide only the *Whitehead* matter. Because the order exceeds the panel's jurisdiction to decide the case before it and purports to authorize the expenditure of public funds, we are compelled to act in our administrative capacity to protect this court's resources and to govern the programs pursued by the court.

The administration of this court and the utilization of court resources must be authorized by at least three of the five elected Supreme Court Justices, i.e., a majority of this court. SCR 7(1); SCR 7(4). Any administrative action is null and void if a majority of the court disagrees

with it. SCR 7(8). The *Whitehead* court issued its final decision in this matter on September 9, 1994. *See* Whitehead v. Comm'n on Jud. Discipline, 111 Nev. 70, 893 P.2d 866 n.1 (Adv. Opn. 11, February 24, 1995). The "Order Appointing Special Master," was entered *one year* after entry of judgment in that matter "in the hope that effective measures will eventuate that will help to avoid future *unwarranted* degradation and erosion of the independence of the court and of the judicial system as a whole." (Empasis in the original.) The undersigned, a majority of the duly elected Supreme Court Justices, determine that the appointment of a special master/prosecutor and concomitant expenditure of funds serves no legitimate purpose and amounts to a gross waste of this court's limited resources. We therefore declare void the "Order Appointing Special Master" entered in Docket No. 24598, and hereby prohibit the payment of any cost or expenditure associated with the appointment of said special master/prosecutor.

It is so ORDERED.

/s/ Young, V.C.J.

/s/ Shearing, J

/s/ Rose, J

APPENDIX C

SUPREME COURT OF NEVADA

In re Petition for a Writ of Prohibition
or in the Alternative for a Writ of
Mandamus

No. 24598

THE HONORABLE JERRY CARR WHITEHEAD,
Petitioner,

v.

NEVADA COMMISSION ON JUDICIAL DISCIPLINE,
Respondent.

July 26, 1994

Judge against whom proceedings were pending before the Commission on Judicial Discipline, petitioned Supreme Court for writ of prohibition to interpret rules of Commission, and moved to preclude involvement of Attorney General in matter. The Supreme Court, Addeliar D. Guy, District Judge, held that: (1) Attorney General's staff may not act as counsel to Commission or as prosecution before Commission in matters regarding judicial misconduct, and (2) Supreme Court had authority to appoint special master to inquire into source of breaches of confidentiality regarding charges against judge.

Motions granted in part, judgment reversed in part.

Springer, J., concurred and filed opinion.

Shearing, J., dissented and filed opinion.

OPINION

ADDELIAR D. GUY, District Judge.

On May 20, 1994, the court heard oral argument on a number of motions filed by both parties. Today, we address Petitioner Whitehead's "motion to preclude further illegal involvement in [this] case by attorney general and associates in order to promote the administration of justice and guarantee due process of law in this and related proceedings" and Petitioner Whitehead's "motion for order to show cause, an investigation, and a protective order," and "motion for appointment of a master to conduct factual investigation."

We are compelled to conclude that Petitioner's motions are meritorious. We accordingly order that Attorney General Frankie Sue Del Papa, Assistant Attorney General Brooke Nielsen and Special Deputy Attorney General Donald J. Campbell be removed as counsel for the Nevada Commission on Judicial Discipline ("Commission") in these writ proceedings and in all disciplinary proceedings now pending against Petitioner Whitehead before the Commission.[1] For reasons hereinafter specified, the Office of the Attorney General is precluded from acting as legal advisor or prosecutor in the present matter or in any mat-

---

[1] Although the Attorney General and the Commission have continued to assert that Special Deputy Attorney General Don Campbell was not and is not acting on behalf of, or in concert with, the Attorney General's office, we put that contention to rest in *Whitehead II*, noting in general the contacts among Assistant Attorney General Brooke Nielsen, Mr. Campbell, and the Commission, and noting in particular, the fact that Mr. Campbell was placed under contract to the Attorney General to serve "at the pleasure of the Attorney General" and was required to "report regularly to the Attorney General concerning the status of the above-named case." *Whitehead v. Comm'n on Jud. Discipline*, 110 Nev. ——, 873 P.2d 946 (1994). Furthermore, the Attorney General and Mr. Campbell have both signed the bulk of pleadings filed in this matter on behalf of the Commission. Mr. Campbell appeared at oral argument and argued on behalf of the Commission along with Assistant Attorney General Nielsen.

ter relating to the constitutional duties of the Commission to hear and decide judicial discipline complaints.

In granting Petitioner Whitehead's motion for the appointment of a master to conduct a factual investigation, we grant the motion in part by adjudicating the clear need for the appointment of a special master, but we defer our decision as to the scope of the investigation and the identity of the investigator for resolution in the near future.[2]

REMOVAL OF THE ATTORNEY GENERAL, THE ASSISTANT ATTORNEY GENERAL AND SPECIAL DEPUTY ATTORNEY GENERAL CAMPBELL AS COUNSEL FOR THE COMMISSION

Petitioner Whitehead urges three grounds for requiring the Attorney General's removal as legal counsel and prosecutor for the Commission. The *first ground* is that the Attorney General, as an elected, Constitutional officer of the Executive Department of Nevada's government, is not permitted by the separation of power clause of our State Constitution to represent the Commission in the exercise of its disciplinary functions or to exercise powers relating to judicial discipline proceedings that are constitutionally vested in the Discipline Commission. The *second ground*

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[2] This interlocutory opinion represents one more incremental measure leading to the eventual resolution of what has become a proceeding transmuted from a comparatively simple writ proceeding to a proceeding far more expansive and complex than otherwise warranted. Petitioner simply invoked this court's exclusive jurisdiction in interpreting, for the first time, the meaning of several of the current permanent rules of the Commission. It is now clear, that in order to provide absolute clarity in the final disposition of this matter issued by this court, and to provide an unmistakable justification for this court's actions, it will be necessary to show, as the evidence will demonstrate, that the Commission has been functioning on an *ad hoc* basis in the imposition of discipline, and that adherence to Commission rules, in an even-handed, non-discriminatory methodology is essential to the independence of the Nevada judiciary. It is this court's intention to finalize these proceedings as soon as humanly possible, consistent with the demands of judicial responsibility and due process.

is that, generally, and under the specific facts of this case, the Attorney General has a number of disqualifiying conflicts in representing the Commission. These conflicts include the conflicts relating to giving the Attorney General access to confidential documents and proceedings of the Commission, the conflict arising out of the fact that the Attorney General is official counsel for the judges and justices of the state, and most importantly, the conflict arising out of the Attorney General's acting as legal advisor to the Commission (which is Petitioner Whitehead's judge and jury) and at the same time prosecuting Whitehead before the tribunal to which the Attorney General has been giving legal advice and counsel. Of equal concern and importance is the problem and potential problem of the Attorney General, and district attorneys over whom the Attorney General has the power of supervision,[3] prosecuting criminal and civil cases before judges who are under investigation and prosecution by the Attorney General in Commission proceedings, and the potential for holding such judges actual or imagined "hostages" without any awareness by opposing counsel. As to the *third ground* which Petitioner Whitehead asserts for seeking the removal of the Attorney General as the Commission's lawyer and prosecutor, we conclude that the Attorney General must be removed as counsel and prosecutor for the Commission in this case. Our conclusion is based on the stated constitutional grounds and on the mentioned conflict of interest created by the Attorney General's office, particularly, the Attorney General's acting as both legal advisor to the Commission and as the prosecutor who has been prosecuting Petitioner Whitehead before the Commission. It is unnecessary to reach the claim relating to the Attorney General's misconduct in arriving at our decision on this motion.

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[3] NRS 228.120(2) states that the attorney general may:

> Exercise supervisory powers over all district attorneys of the state in all matters pertaining to the duties of their offices, and from time to time require of them reports as to the condition of public business entrusted to their charge.

First Ground: Constitutional Disqualification [4]

Article 3, section 1 of the Nevada Constitution provides as follows:

> The powers of the Government of the State of Nevada shall be divided into three separate departments, —the Legislative,—the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases herein expressly directed or permitted.

This court has consistently affirmed that "[t]he division of powers is probably the most important single principle of government declaring and guaranteeing the liberties of the people." *Galloway v. Truesdell*, 83 Nev. 13, 18, 422 P.2d 237, 241 (1967). This principle is also of Federal Constitutional dimension and has occupied a position of unquestioned importance since the early days of the Republic. As James Madison noted in The Federalist No. 47, " '[w]ere the power of judging joined . . . to the executive power, the judge might behave with all the violence

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[4] In *Whitehead I*, Judge Guy wrote that he would "order the Attorney General, her associates and Special Deputy Attorneys General to have no further contact with this case or any other matter appearing before the Commission." Judge Guy further observed as follows:

> It is certain that to permit the executive department, to wit, the Attorney General, whether upon request or otherwise, to be counsel or in any way participate in the possible disciplinary action procedure of a justice or district judge before whom the Attorney General must appear for judicial decisions, could cause investigations, brought about for political reasons or because of decisions that were unfavorable.

Whitehead v. Comm'n on Jud. Discipline, 110 Nev. 128, 166, 869 P.2d 795, 818-19 (1994) (Guy, D.J., concurring).

Our present opinion reflects the previously expressed judgment of Judge Guy, on this issue.

of the oppressor'." (quoting Montesquieu). Merging the adjudicative power of the Commission with the executive power, as evidenced in the case before us raises this very specter.

Article 6 (the *Judicial* Article), section 21 of the Nevada Constitution creates the Commission on Judicial Discipline. The Commission is a part of the judicial branch of government, vested with the constitutional power to "censure, retire or remove" a judge or justice, subject to such rules as this court might promulgate, and subject to appellate review by this court. Nev. Const. art. 6, § 21(1). The Attorney General, on the other hand, is "a constitutional officer in the executive branch of government" whose various duties are established by the legislature. *See Ryan v. District Court*, 88 Nev. 638, 642, 503 P.2d 842, 844 (1972); *see generally* Nev. Const. art. 5 § 19. In matters of judicial discipline, it is the Commission, not the Attorney General, which the constitution vests with the power and duty to deal with all matters relating to erring judges who are charged with violating the Code of Judicial Conduct. The Commission is constitutionally empowered to "designate *for each hearing* an attorney or attorneys at law to act as counsel to conduct the proceeding," (*id.* at art. 6, § 21(9)(a)). Nowhere in the constitution is the Commission required or empowered to employ the Attorney General, a member of a separate and co-equal branch of government, to act as its counsel.[5] It is not constitutionally permissible for the Attorney General to investigate or prosecute a judge or justice on behalf of the Commission. The Attorney General may not represent the Commission in judicial discipline matters, nor may the Attorney General "prosecute" a judge or justice before the Commission, because "one department cannot exercise the power of the other two" without violating

---

[5] In *Goldman v. Nevada Comm'n on Judicial Discipline*, 108 Nev. 251, 830 P.2d 107 (1992), the Commission in fact hired independent counsel to prosecute the judge.

article 3, section 1 of the Nevada Constitution. *Galloway*, 83 Nev. at 19, 422 P.2d at 242.[6]

Although the Commission disputes that the Attorney General's office engaged in exercising any Commission functions, the record clearly reflects that Special Deputy Attorney General Don Campbell engaged in a very extensive investigation of the allegations against Petitioner on behalf of the Commission. Mr. Campbell's affidavit also indicates that he was involved in carrying out the Commission function of screening complaints and that in doing so made the determination that many of the incidents alleged in one of the complaints against Petitioner did not warrant further action by the Commission. Whether Spe-

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[6] Our present holding relative to separation of powers is consistent with our prior rulings in this area. For example, in *Dunphy v. Sheehan*, 92 Nev. 259, 549 P.2d 332 (1976), this court held that the section of Nevada's Ethics in Government law excluding members of the judiciary from regulation under that law was mandated by the separation of powers clause of the Nevada Constitution. *Id.* at 265, 549 P.2d at 336. Similarly, in *Galloway v. Truesdell*, this court held that it was an impermissible violation of separation of powers to require district court judges to determine which ministers were qualified to administer legally valid marriage ceremonies. *Id.* at 31, 422 P.2d at 249. In *In Re Platz*, this court held that state bar disciplinary proceedings did not violate separation of powers because this court retained the ultimate decision as to any penalty to be imposed. 60 Nev. 296, 302-303, 108 P.2d 858, 861 (1940); *see also Desert Chrysler-Plymouth v. Chrysler Corp.*, 95 Nev. 640, 600 P.2d 1189 (1979) (statute requiring district courts to determine "good cause" for issuing automobile dealership licenses violates separation of powers); *State v. Douglass*, 33 Nev. 82, 110 P. 177 (1910) (legislature may not combine the offices of Clerk of the Supreme Court and Secretary of State). This line of cases is bolstered by a persuasive opinion of the Attorney General which concludes that, because a Highway Patrol Trooper is a member of the executive branch of government, it would be "constitutionally invalid for an employee of the patrol to simultaneously serve as a member of the state legislative or judicial departments." Op. Att'y Gen. No. 168 (May 22, 1974). A member of the executive branch is simply not constitutionally permitted to act in a judicial capacity.

cial Deputy Attorney General Campbell was acting for the Commission in making these Commission decisions or was merely advising the Commission to take these actions, the *executive branch*, through the Attorney General's office, has been actively engaged in the judicial discipline process—a process that can be carried out properly and constitutionally only by the Commission on Judicial Discipline itself. Nev. Const. art. 6, § 21(7).

The State of Minnesota has recognized that it is not proper for the Attorney General to act as the Attorney General has acted in this case. *See* Rules of Board on Judicial Standards, Minn. Rules of Court, Rule 1(d)(10) at 693 (West Supp.1994) (Authorizing the Executive Secretary of the Board on Judicial Standards to "[e]mploy, with the approval of the board, special counsel, private investigators, or other experts as necessary to investigate and process matters before the board or the Supreme Court. *The use of the attorney general's staff for this purpose shall not be allowed.*") (Emphasis added.) The source of and basis for the Minnesota rule is the ABA's *Standards Relating to Judicial Discipline and Disability Retirement. See Judicial Conduct Organizations Governing Provisions* (Kathleen Sampson, ed., 1984). Standard 2.8 states that the use of members of "the attorney general's staff" to perform commission functions "is not recommended. . . . *Their use may also interfere with the independence of the judiciary.*" *Id.* at 15; *see infra* note 5 (emphasis added).

We are, of course, well aware of NRS 1.450(2) which commands the Attorney General to act as counsel "upon request" of the Commission. If the Commission or its members were to be sued for, say, some alleged tortious activity, there would be no bar to the Attorney General's defending such a lawsuit, as long as it did not involve the Commission's constitutional mandate to hear and decide misconduct complaints against judges.[7]

---

[7] Contrary to respondent's assertions, the Judicial Discipline Commission is not just another administrative agency which can com-

If we were to read NRS 1.450(2) as permitting the Attorney General to represent the Commission in matters relating to specific cases of judicial discipline or, worse, as permitting the Commission's legal advisor also to be the prosecutor of judicial discipline complaints, such a reading would run contrary to the constitution. *State v. Douglass*, 33 Nev. 82, 92, 110 P. 177, 180 (1910) ("the Legislature, in the absence of express constitutional authority, is as powerless to add to a constitutional office duties foreign to that office, as it is to take away duties that naturally belong to it"). The statute may properly permit the Commission to seek the legal advice of the Attorney General, much as another state entity might [8]; however, the statute cannot permit the invasion of the judicial department by the executive department of government. This would occur if the Attorney General were permitted to sit in from day to day in the Commission's meetings, during which the principal Commission business is to deal with matters relating to judicial discipline. To allow this would be to allow the Attorney General to become almost an *ex facto* member of the Commission. It must be remembered that the Attorney General and her extensive staff must, in the performance of their constitutional duties, appear before the judges and justices of this state on a daily basis. If those same lawyers are privy to confidential and damaging information about judges, then, at the very least, the *appearance* of an impartial tribunal is lost. *See* conflict of interest section, *infra*, pp. 9-13;

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bine investigative, prosecutorial and judging functions. As this court held in *Whitehead I*, the Commission is a court of judicial performance, created by the Nevada Constitution as a part of the judicial branch of government. *Whitehead v. Comm'n on Jud. Discipline*, 110 Nev. 128, 160 n. 24, 869 P.2d 795, 815 n. 24 (1994); *cf., Laman v. Nevada R.E. Adv. Commission*, 95 Nev. 50, 589 P.2d 166 (1979).

[8] NRS 41.0338-41.0339 would allow the Commission members to seek the representation of the Attorney General if they were sued for actions taken in their official capacity.

compare ARJD 2(9) ("Prosecuting officer means *an attorney* designated by the commission to file and prosecute the Formal Statement of Charges.") (Emphasis added.)

We must necessarily disapprove of the practice of having a member of the Attorney General's staff routinely participate in Commisison meetings and deliberations.[9] The policy rationale behind requiring the Commission to use independent counsel to perform both advisory and prosecutorial functions for the Commission in judicial discipline proceedings is obvious: it ensures that disciplinary proceedings are not pursued for personal, partisan, or political gain, and it ensures that one branch of government does not usurp the vital functions of another or place itself in the position of holding the others hostage.

Where a statute is susceptible to both a constitutional and an unconstitutional interpretation, this court is obliged to construe the statute so that it does not violate the constitution. *Sheriff v. Wu*, 101 Nev. 687, 708 P.2d 305 (1985). NRS 1.450(2) is constitutional insofar as it permits the Commission to request official legal opinions of the Attorney General in matters unrelated to judicial discipline. NRS 1.450(2) cannot be constitutionally read to authorize the Attorney General to act as counsel to the Commission or to act as prosecutor in judicial discipline proceedings.

Second Ground: The Attorney General's Conflict of Interest.

Amici (Ad Hoc Committee for the Preservation of an Independent Judiciary) argue that the involvement of the Attorney General in the disciplinary process creates hopeless conflicts of interest and roles and that such involvement creates an untoward and undesirable opportunity for

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[9] The proposed ABA Model Rules suggest that independent counsel be retained to act as legal counsel to the commission to avoid these very conflicts.

undue influence upon the judiciary. We examine this argument carefully.

First we look at the potential for abuse inherent in any involvement by the Attorney General in the disciplinary process. As we held in *Whitehead I*, the Commission is part of the Judicial Department. *See Whitehead v. Comm'n on Jud. Discipline*, 110 Nev. 128, 159, 869 P.2d 795, 814 (1994). The rules this court has adopted pursuant to its constitutional mandate provide a clear requirement of confidentiality at least until after a probable cause hearing, a finding of probable cause, and the filing of a formal statement of charges. ARJD 5(1). It is not difficult to see the possibilities that exist if the Attorney General is allowed to participate in the Commission's disciplinary activities. If the Attorney General has free access to the confidential information in possession of the Commission, the temptation is clearly present for putting adverse, confidential information about a judge to improper and even political use. Anonymous "leaks" or threats of leaks could very well provide those with improper access to confidential information about judges considerable leverage over sitting judges, who, in our elective system, are always faced with the possibility of a contested election. Although we are not suggesting the existence of such implicaitons in the present case, there is certainly a potential for an Attorney General who has adverse information relating to a judge to use this information to damage the career of any judicial officer that is seen as a political threat to the Attorney General or to his or her political allies or political agenda.

The Attorney General's office, as now constituted, has close to one hundred attorneys who appear in many courts of this state. It is not difficult to see how the independence of judges might be compromised if a judge before whom a deputy attorney general was appearing felt threatened by the Attorney General's possession of confidential information, whether true or not, that might be harmful to the judge if released to the public.

The threat just described is only one of the possible conflicts presented by allowing the Attorney General to participate in the judicial discipline process. Another conflict is presented by the fact that the Attorney General is the official legal representative of the judges and justices in this state and cannot, by the nature of that office engage in the prosecution of the very judges that the Attorney General represents as counsel.[10] It is not the foregoing conflicts, however, that give us the most pause. The most dangerous conflict lies in the Attorney General's acting as both legal counsellor to the Commission and as prosecutor of judicial discipline complaints.

Special Deputy Attorney General Campbell has been acting in the role of investigator and prosecutor in this case. The Attorney General apparently sees nothing untoward or unusual about Special Deputy Attorney General Campbell's acting in such capacities in this case, as the Attorney General freely tells us that her office has "investigated and processed literally dozens of [other] judicial misconduct complaints over the years." Petition for Rehearing at 7. Such engagement by the Attorney General in the investigation and prosecution of judges is not only a violation of the separation of powers doctrine of our Constitution, it is a conflict of interest for the Attorney General to be prosecuting before the Commission the very judges that she represents as counsel, and before whom she appears in the course of prosecuting criminal and civil cases. Again, of equally great concern is the conflict created by the Attorney General's acting as either prosecutor or legal advisor to the judicial tribunal.

It cannot be denied that the Attorney General has been acting as legal advisor to the Commission while investigations and prosecutorial activities were being conducted by

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[10] Of course the Attorney General is constitutionally authorized to pursue *criminal* investigations and prosecutions of judges or justices. Nev. Const. art. 5, § 22; NRS 228.175(2) and (4).

that office against Petitioner Whitehead. Ordinarily, a client's regular consultation with his or her attorney, by the nature of the relationship, tends to instill feelings of trust and confidence and, frequently, friendship as between the client and the attorney. Most readers of this opinion should not have to be further convinced that it is simply not fair to require an accused judge or justice to appear before a tribunal where the judge's prosecutor is also acting as legal counsel to the tribunal. In our adversarial system we have always been scrupulous about keeping adjudicative functions separate from the prosecutive function, and fairness requires that we continue to do so.

The proposed changes to the American Bar Association's Model Rules for Judicial Disciplinary Enforcement deal quite extensively with this problem. The Report and Recommendation to the ABA House of Delegates strongly recommends "the separation of conflicting functions." Thus "[a] commission member who participates in the investigation should not participate in the adjudicative process and vice versa." Similarly, the proposed Model Rules also envision separate counsel for the Commission: One attorney ("disciplinary counsel") would assist the Commission in performing its investigative and prosecutorial functions, another ("commission counsel") would provide the Commission with "legal research, drafting, and advice." The report observes that the roles of prosecutor and advisor are "inconsistent" and ought not be embodied in a single person, because such a separation of functions is "crucial to the perception of fairness." The report also notes that "[a] system that relies on other government agencies to investigate complaints or present evidence, or both, loses efficiency and endangers confidentiality," concluding that "[d]isciplinary counsel should not use law enforcement officials or staff to investigate complaints or present cases. . . . Their use could com-

promise the confidentiality of investigations and could pose separation of powers problems." [11]

The conflicts envisioned by the ABA have manifested themselves all too clearly in the manner in which cases are currently being handled by the Commission. As noted in *Whitehead II*, the Attorney General and the Commission have had at least one judge under some kind of supervisory control or "probation," which requires the judge to report to the Attorney General's Office under penalty of more severe disciplinary action in the event the "probation" fails. This supervision is going on while the Attorney General's staff is presumably still trying cases before the supervised judge. 110 Nev. at ——, 873 P.2d at 971. This is a clear conflict of interest. Obviously, the Attorney General or the district attorneys over whom she has supervisory control, appear in an adversarial setting before the very judges she is investigating or is supervising under "probation." Again, given the current rules of confidentiality surrounding judicial discipline matters prior to a finding of probable cause, it is inevitable that some members of the Attorney General's and district attorneys' staffs will appear before judges while in possession of damaging and confidential information about those judges.

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[11] The ABA Standards Relating to Judicial Discipline and Disability Retirement currently in force also note these same concerns. For example, Standard 2.1, entitled "Need for Independence" provides that "[t]he commission should be independent of and free from interference from the executive or legislative branches and, although operating within the judicial branch, should report only to the supreme court." American Bar Association, *Standards Relating to Judicial Discipline and Disability Retirement* 9 (February, 1978). Similarly, the commentary to Standard Rule 2.8 states that the use of law enforcement officers such as "members of the attorney general's staff" to perform commission functions "is not recommended . . . [as] [t]heir use may also interfere with the independence of the judiciary." *Id.* at 15.

This may compromise the appearance of an impartial tribunal.[12]

The Commission has asserted that if this court does not allow the Attorney General to act as Commission counsel, the Commission will be unable to fulfill its constitutional function. This rather extravagant assertion may be rejected out-of-hand because the rules clearly contemplate that the Commission may employ independent counsel. ARJD 41; Nevada Const. art. 6 § 21(9)(a). We also reject the Commission's argument that this court will violate the Commission's right to counsel of its choice and thereby deny the Commission due process of law if it determines that the Attorney General may not act as she has in this proceeding. Even if we were to assume that a public body has some identifiable legal right to "counsel of its choice," such a right would not include the Commission's right to be represented by counsel with the clear conflict of interest problems that are discussed in this Opinion; and, certainly such a right could not be sufficient to overcome the separation of powers clause of the Nevada Constitution. *See Kabase v. District Court*, 96 Nev. 471, 611 P.2d 194 (1980).

The separation of powers clause of the Nevada Constitution prohibits the Attorney General from acting as prosecutor of judges in judicial discipline cases and from acting as the Commission's counsel in disciplinary matters. We have, of course, already held that the Attorney General may issue official opinions to the Commission and that the Attorney General may "supply[] the Commission

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[12] The Attorney General appears in this case to have initially recognized this conflict when she requested the Board of Examiners to provide the funds to hire Don Campbell as a Special Deputy Attorney General, stating that the hiring was necessary in part because the Attorney General's office had a potential conflict of interest in this case. (Contract between Attorney General and Don Campbell.) *See* Petitioner's Motion to Preclude Further Involvement, Exhibit 2.

with abstract advice on an occasional basis. . . . ." *Whitehead I*, 110 Nev. at 133 n. 5, 869 P.2d at 798 n. 5. However, this certainly does not mean that the Attorney General can advise the Commission in matters relating to judicial discipline nor that the Attorney General can act as prosecutor, prosecuting judicial discipline complaints before the Commission. What is painfully clear, as mentioned previously, is that the Attorney General may not be allowed to act as either advisor or prosecutor.[18]

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[18] The Dissent garners suggestions that the Majority in this limited Opinion somehow is, or will prevent, the Commission from carrying out its constitutional mandate. There is no intent and none should be inferred that this limited Opinion subjugates or prevents the Commission from fulfilling its duties. This limited Opinion only prevents the Attorney General, the Attorney General's regular deputies and the Special Deputy Attorney General, in this matter, from any further representation of the Commission in these proceedings, or in any proceedings before the Commission. It does not prevent the Commission from engaging its own independent counsel as provided in article 6, section 21, subsection 9(a) of the Constitution and by the rules of this court. On the contrary, this limited Opinion directs the Commission to engage independent counsel for this and any other matters before the Commission.

In *Goldman v. Nevada Comm'n on Judicial Discipline*, 108 Nev. Nev. 251, 830 P.2d 107 (1992), independent counsel was appointed for the Commission as the Attorney General either recognized the conflict or the constitutional prohibition. Likewise, in these proceedings, the Attorney General initially recognized the conflict and requested special counsel to represent the Commission. Had the Attorney General not appointed the special counsel or Special Deputy Attorney General, *inter alia*, responsible to the Attorney General for his retention and payment, then this limited Opinion may not have been necessary except in future proceedings.

The Dissent infers that this Opinion nullifies NRS 1.450(2). If that is the effect of preventing the Attorney General from proceeding as the attorney for the Commission then, so be it. This will not be the first time, nor the last, that this court and other courts have stricken portions or all of legislative acts as being unconstitutional.

The Dissent raises the presumption that this Opinion rests its arguments on the assumption that the Attorney General will be unable to resist the temptation to engage in misconduct with respect

Ground Three: Attorney Misconduct

Petitioner Whitehead maintains as a third and independent ground for asking that the Attorney General be removed from this case the Attorney General's intemperate and accusatory public statements relating to these proceedings. Because of the foregoing conclusions regarding disqualification based upon constitutional and conflict of interest grounds, it is unnecessary to presently rule on Petitioner Whitehead's allegations of ethical misconduct on the part of the Attorney General or the effect that this conduct might have on Petitioner Whitehead's ability to receive fair treatment, which is the essence of due process.

INVESTIGATION OF BREACHES OF CONFIDENTIALITY AND VIOLATIONS OF OTHER RULES OF THIS COURT

Petitioner Whitehead claims not only that he has been severely prejudiced by the unlawful disclosure of charges which the Nevada Constitution requires to be kept confidential, he claims that the integrity of the whole judicial discipline process is endangered by what appear to be almost routine "leaks" of judicial disciplinary proceedings.

Now is not the time to go into extended discussion of the confidentiality provisions mandated by the Nevada Constitution in judicial discipline matters, but a few words may be said.[14] The argument of some is, of course, that

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to judges. This court has so often reversed judgments and criminal convictions, not upon any actual misconduct, but upon the perception or assumption that misconduct could occur, either intentionally or unintentionally. Given the history of overzealous or overaggressive prosecutors in these United States, there can be no doubt that misconduct does and has occurred either intentionally or unintentionally.

[14] "The supreme court shall make appropriate rules for: (a) The confidentiality of all proceedings before the commission, except a decision to censure, retire or remove a justice or judge." Nev. Const. art. 6, § 21(5)(a); *see* ARJD 5 and 6.

judges are no different from any other public official and that if any allegations of misconduct are made by anyone, such charges should immediately be open to the public. The counterargument (and the one adopted by the framers of the Nevada Constitution) is that the judiciary depends to a large degree for its effectiveness on the trust and confidence that the people place in that institution's ability to render, day-to-day, fair and impartial decisions. By its very nature, the judiciary deals with disputes that often leave litigants or counsel with negative or agitated feelings. As a result, many complaints may be generated and sent to the Commission about judges that are entirely without merit. If all of these unfounded complaints were available to the public and the media, without any inquiry into their substance, public esteem for the judiciary as a whole would suffer, thus making it more difficult for the one branch of government that should be a safe haven for the impartial and fair resolution of disputes, to inspire public confidence in the integrity of judicial proceedings.

To a great extent, the willingness of litigants—great and small—to respect and obey the judgments issued by our courts depends upon a deserved public perception that the judiciary does, in fact, dispense justice. Premature exposure of meritless complaints against judges would make it appear that our judges were guilty of rampant misconduct and would threaten the independent function of the judiciary. *See Kamasinski v. Judicial Review Council,* 797 F.Supp. 1083 (D.Conn. 1992).

Whichever side of this argument one might want to espouse, the fact remains, that, at present, all complaints against judges must, as commanded by the Nevada Constitution and by the rules of this court enacted in accordance with the direct command of the Constitution, remain confidential until there has been a finding of probable cause and a formal statement of charges has been filed as a public document. Despite the voice of those who minify the seriousness of breaches of confidentiality, we are un-

able to arrogate to ourselves a superior wisdom or authority than the people of this State who mandated the confidentiality of judicial discipline proceedings in our fundamental law, the Nevada Constitution.

The Commission is entrusted with the constitutional responsibility of safeguarding the confidentiality of Commission proceedings until, under the current Commission rules, there has been a finding of probable cause. One would therefore assume that the Commission would be greatly concerned about the breaches of confidentiality in this case and in others that are documented in this record. One would further assume or at least hope that as soon as the Commission learned of these constitutional violations it would have taken immediate steps to uncover the source of the breaches and of the "leaks" that have punctuated these proceedings and expanded them into a vastly more complex and multi-dimensional dispute. To our dismay, the Commission and the Attorney General have not only evinced no concern about the breaches of confidentiality, but they have taken affirmative steps to oppose any inquiry into the source of the "leaks." [15]

It is most apparent that someone must get to the bottom of these flagrant constitutional infractions. At this stage of the proceedings we are not prepared, as a court, to launch a full investigation into these matters. Although it is clear that we have the authority to appoint a fact-finding master to delve into the source of the violations,[16] we are not ready at this time to define the scope of activities to be conducted in this regard. We do, however, conclude

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[15] The Commission and the Attorney General's office have steadfastly opposed any investigation into the leaks, arguing at various times that Petitioner leaked the confidential information, that this court lacked the authority to enforce these constituional provisions, and that the First Amendment prevents this court from requiring the Commission to enforce its own confidentiality rules.

[16] *See, e.g., Young v. Board of County Comm'rs*, 91 Nev. 52, 530 P.2d 1203 (1975).

that an investigation into the breaches of confidentiality is warranted. A master will have to be appointed having the power to issue subpoenas and other compulsory process. In due time the court will issue an order naming the court master or other investigator and defining the scope of the powers and duties that will be necessary to carry out the required investigation.

For the reasons discussed above,

IT IS HEREBY ORDERED:

1. The Attorney General and her staff, and Special Deputy Attorney General Donald J. Campbell shall be, and the same hereby are removed as counsel to the Commission in the instant proceeding, and the Attorney General and her staff shall hereafter take no part or assume any role in disciplinary matters brought before the Commission.[17]

2. A special master shall hereafter be appointed by the court and shall be specially empowered by further and specific order of this court to conduct such investigations as shall be necessary to determine the sources of the unlawful breaches of confidentiality that have occurred in these proceedings and the extent to which they may have impacted Petitioner's due process rights.[18]

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[17] The Commission is herein authorized to obtain a Nevada attorney. There are a multitude of Nevada attorneys who are well-qualified to act as counsel to the Commission to replace the Attorney General, her staff, and any special deputy attorney general, to continue in this matter and in any other matter presently before the Commission and/or to be brought before the Commission.

[18] The Governor appointed the Honorable Addeliar D. Guy, Judge of the Eighth Judicial District Court, to sit in place of the Honorable Cliff Young, Justice, who is disqualified because he is a member of the Commission on Judicial Discipline. Nev. Const. art. 6 § 4.

STEFFEN, V.C.J., SPRINGER, J., and ZENOFF, Senior Justice,[19] concur.

SPRINGER, Justice, concurring:

I have signed the four-judge Majority Opinion in this case because I am convinced that the Attorney General must be removed from any participation in judicial discipline prosecution of Judge Jerry Carr Whitehead. I write this Concurring Opinion for two reasons: one is to answer some of the contentions raised by Justice Shearing in her Dissent, the other is that I wish to discuss the misconduct of Attorney General Del Papa, which I see as a ground for removing her from this case, in addition to, and entirely separate from, the grounds of constitutional incapacity and conflict of interest relied upon by the Majority Opinion.

Inasmuch as the Attorney General's conflicts of interest and constitutional incapacity provide ample and sufficient grounds for the action taken by the Majority, I had initially agreed that it was unnecessary to voice my view that the Attorney General's misconduct constitutes a discrete and independent ground warranting her removal from this matter. In light of the position now advanced by the Dissent, that constitutional incapacity and conflict of interest provide insufficient cause to support the Majority's decision, I must feel compelled to address the additional cause found in the Attorney General's disqualifying misconduct.

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[19] The Honorable Thomas L. Steffen, Vice-Chief Justice, assigned the Honorable David Zenoff, Senior Justice, to sit in the place of the Honorable Robert E. Rose, Chief Justice. Nev. Const., art. 6 § 19; SCR 10.

THE SHEARING DISSENT

Article 6, section 21(1) of the Nevada Constitution provides:

> A justice of the supreme court or a district judge may, in addition to the provision of article 7 for impeachment, be *censured, retired or removed by the commission on judicial discipline.* A justice or judge *may appeal* from the action of the commission to the supreme court, which may reverse such action or take any alternative action provided in this subsection.

(Emphasis added.)

Despite this clear and unambiguous language contained in the "Judicial Article" of the Nevada Constitution, the Dissent insists: (1) that the Nevada Constitution does not vest the Commission "with the authority to exercise the judicial power of this state"; (2) that "the decisions of the Commission are not final"; and (3) that this court "alone has the power to enforce the Commission's orders."

From these three conclusions, it is apparent that my dissenting colleague perceives the Nevada Commission on Judicial Discipline as an impuissant tribunal possessed of mere advisory or recommendatory powers. Restrained by article 6, section 21(1) of the Nevada Constitution and persuasive, prior precedent of this court interpreting that provision, neither I, nor my colleagues in the Majority, are willing or able to ascribe to the view that the Commission has been relegated to the impotent and ineffectual advisory status perceived by the Dissent. Therefore, for the reasons which follow, I emphatically and respectfully reject the views expressed in the Dissent.

First, the Dissent declares:

> The decisions of the Commission are not final, but are subject to review by the Supreme Court, which alone has the judicial power to enforce the Commission's orders.

This view of the Commission's authority, however, is directly repelled by the court's holding in *Goldman v. Nevada Comm'n on Judicial Discipline*, 108 Nev. 251, 830 P.2d 107 (1992), a holding which the Attorney General, on behalf of the Commission, has repeatedly—albeit inaccurately and incompletely—cited to this court in the instant proceeding.

Specifically, in *Goldman*, this court explained at length:

> The relevant constitutional provision defining this court's jurisdictional role in an appeal challenging commission action specifies as follows:
>
> > A justice of the supreme court or a district judge may, in addition to the provision of article 7 for impeachment, be *censured, retired or removed by the commission on judicial discipline.* A justice or judge *may appeal* from the action of the commission to the supreme court, which may reverse such action or take any alternative action provided in this subsection.
>
> Nev. Const. art. 6, § 21(1). *Absent the prosecution of an appeal to this court by an aggrieved judge, this provision unambiguously vests the commission with final authority to order the censure, removal or retirement of a judicial officer. A commission decision to censure, remove or retire is not merely advisory or recommendatory in nature; it is of independent force and effect absent perfection of an appeal to this court.*[1]

This broad constitutional authority distinguishes Nevada's commission from similar commissions in

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[1] Of course, as the Majority Opinions in *Whitehead I and II* have emphasized, this section of the *Goldman* opinion only addressed the standards of review applicable to *appeals* from Commission decisions to censure, retire or remove. The quoted passage does not speak to this court's authority to intervene in commission proceedings by way of extraordinary writ. *See* ARJD 40(7); Nev. Const. art. 6, § 4 (Nevada's "all writs" provision).

other jurisdictions. The California Commission on Judicial Performance, for example is constitutionally empowered only to make "recommendations" concerning the imposition of disciplinary sanctions. *See* Cal. Const. art. 6, § 18(c). Formal approval of further action by the California Supreme Court is necessary before any disciplinary sanctions may be imposed. *Id.*

In declaring the standard of review to be applied under this "recommendation" system, the California Supreme Court has observed:

> Were a recommendation of independent forces and effect absent further action by this court, our review of the evidentiary basis for that recommendation might properly be limited to a determination whether the Commission's findings of fact were supported by substantial evidence. Under such a standard of review we would not be free to disregard the Commission's findings merely because the circumstances involved might also be reasonably reconciled with contrary findings of fact.

Geiler [*v. Commission on Judicial Qualifications,* 10 Cal.3d 270, 110 Cal.Rptr. 201, 203-04,] 515 P.2d [1,] at 4. In *Geiler,* however, the court further noted that the California Constitution expressly entrusts that state's high court with the sole responsibility and authority to render "the ultimate, dispositive decision to censure or remove. . . ." *Id.* In exercising that authority, the California court independently evaluates the record evidence and renders its own findings of fact and conclusions of law. Judicial disciplinary procedures in many other jurisdictions are patterned after California's pioneering judicial disciplinary procedures and similarly require review and final approval of commission recommendations by a higher tribunal.

Thus, the express authority vested in this court under article 6, section 21 of the Nevada Constitution contrasts sharply with the ultimate and dispositive constitutional authority conferred upon courts of review in these "recommendation" jurisdictions. It is readily apparent that by deviating from the California model, the drafters of article 6, section 21 of the Nevada Constitution rejected California's "recommendation" system in favor of procedures intended to vest a far greater degree of authority in Nevada's commission. See, e.g., Matter of Samford, 352 So.2d 1126, 1129 (Ala.1978) (where adoption of constitutional amendment replaced old "recommendation" system of judicial discipline with new system merely authorizing appeal, Alabama court's scope of review was restricted by such amendment to a determination of "whether the record shows clear and convincing evidence to support the order of the Court of the Judiciary").

We conclude, therefore, that the Nevada Constitution does not contemplate this court's de novo or independent review of factual determinations of the commission on appeal. To the contrary, the constitution confines the scope of appellate review of the commission's factual findings to a determination of whether the evidence in the record as a whole provides clear and convincing support for the commission's findings. The commission's factual findings may not be disregarded on appeal merely because the circumstances involved might also be reasonably reconciled with contrary findings of fact. See Samford, 352 So.2d at 1129; cf. Geiler, [110 Cal. Rptr. at 203-04.] 515 P.2d at 4.

This court, of course, is not bound by the commission's conclusion of law. *Cf. In re Jones,* 728 P.2d 311, 313 (Colo.1986). Moreover, where an appeal from the commission's order of censure, removal or retirement is taken, this court is expressly empowered to "reverse such action or take any al-

> ternative action provided in this subsection." Nev. Const. art. 6, § 21(1). Thus, *on appeal,* we are specifically enjoined by the constitution to exercise our independent judgment regarding the appropriate sanction warranted by factual findings properly adduced by the commission.

See Goldman v. Nevada Comm'n on Judicial Discipline, 108 Nev. 251, 265-268, 830 P.2d 107, 116-118 (1992) (footnotes omitted; emphasis added).[2]

Thus, in interpreting article 6, section 21(1) of the Nevada Constitution, this court held in *Goldman:* (1) that the constitution "unambiguously" vests the Commission with *"final authority to order the censure, removal or retirement of a judicial officer";* and (2) that *"a commission decision to censure, remove or retire is not merely advisory or recommendatory in nature; it is of independent force and effect absent perfection of an appeal to this court." Id.* (emphasis added).

Contrary to the Dissent's assertion that the conclusions of the Majority in *Whitehead I* are bereft of any supporting legal precedent, the Majority Opinion in *Whitehead I* did indeed cite this precise holding in *Goldman* as authority for the position that the Commission must be "regarded as being a constitutionally established 'court of judicial performance and qualifications,' whose functions are

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[2] In a footnote in *Goldman,* this court further observed that the intent to vest far greater authority in Nevada's Commission than is vested in states with "recommendation" systems is also evidenced by:

> the care taken by the drafters to insure fairness, competence, non-partisanship and geographic diversity in the commission's makeup. The commission, for example, must be composed of two justices or judges appointed by the supreme court, two attorneys appointed by the state bar, and three lay members appointed by the Governor. See Nev. Const. art. 6, § 21(2). Moreover, an appointing authority may not appoint more than one resident of any county, nor more than two members of the same political party. *See* Nev. Const. art. 6, § 21(4).

Goldman, 108 Nev. at 267 n. 16, 830 P.2d at 117 n. 16.

judicial in nature and essentially of the same fact-finding and law-applying nature that the state constitution assigns to the District Courts of this State." *See Whitehead I,* 110 Nev. 128, 160 n. 25, 869 P.2d 795, 815 n. 25 (1994). Specifically, the *Whitehead I* Majority explained:

> [The court in *Goldman*] assigned a higher status to the Commission and accorded greater deference to its *final decisions* than other courts have done, in accord with our view that *the Commission is not to be regarded merely as an administrative agency but as a true "Court of Judicial Performance and Qualifications."* Our deference to the Commission is in significant contrast to the California Supreme Court action in the case *Geiler v. Comm'n on Judicial Qualifications,* [10 Cal.3d 270, 110 Cal. Rptr. 201,] 515 P.2d 1 (1973). Still, the fact that we held in *Goldman* that the Commission, *like the District Courts,* is free from our *de novo* or independent review of factual findings only emphasizes how important it is in Nevada's system that the Commission, like our District Courts shall apply with fidelity the substantive legal principles articulated by other constituted authority. It also underscores that in Nevada it is highly importtant that the established substantive rules or principles be applied only in compliance with the procedural requirements delineated by constituted authority. Moreover, in Nevada, as with our District Court's when counsel may have led the Commission to stray from its jurisdiction as defined in the rules by other constituted authority, it is important that such deviations be subject to review by interlocutory writ, as are those of the District Courts.

Id.

Notwithstanding this court's meticulously crafted prior precedent interpreting the unambiguous language of article 6, section 21(1), the Dissent seems to be saying that the Judicial Discipline Commission is a mere "fact-finding" agency, akin to the Board of Medical Examiners or the

Real Estate Commission. (Citing to *Bergman v. Kearney*, 24] F. 884, 898 (D.Nev.1917), the Dissent observes that "[j]udicial power, in the constitutional sense, is something more than authority to hear and determine; it includes the power to decide finally and conclusively, and also power to carry its determination into effect." Neither I, nor the other justices in the Majority, quarrel with this definition in *Kearney* of "judicial power." The Dissent, however, can cite to no constitutional provision, statute, or case authority which interprets article 6, section 21 of the Nevada Constitution so as to support the further conclusion in the Dissent that the Commission on Judicial Discipline should be viewed as merely an administrative "agency or commission" which is "not vested with the authority to exercise the judicial power of this state." To the contrary, the relevant constitutional provision and case law unambiguously establish that the Commission is indeed empowered "to decide finally and conclusively" matters related to judicial disability and misconduct, and "to carry its determinations into effect."

For example, as the Majority Opinion in *Whitehead I* explained:

> [The Commission] was created in 1976 by an amendment to the . . . "Judicial Department" article of our constitution that inserts into article 6 a new section 21, which not only creates the Commission but also grants this court certain powers over it. In very broad terms, section 21(1) recognizes that the Supreme Court, theretofore also created by the "Judicial Department" article, is to have appellate jurisdiction over the Commission, as it does over Nevada's District Courts. . . .

Whitehead I, 110 Nev. at 131, 869 P.2d at 797. Significantly, the 1976 constitutional amendment establishing the Commission amended this state's *Judicial Article*, the very Judicial Article cited by the Dissent as declaring where the judicial power of this state resides.

Thus, while it is true that article 6, section 1 of the Nevada Constitution vests the judicial power of this state in a court system comprised of the supreme court, the district courts and the justice's courts, the Dissent overlooks the fact that the 1976 amendments changed our Judicial Article so as to vest judicial power in the Commission as well.

As amended, the Nevada Constitution's "Judicial Article," now provides that a judge or justice may be "censured, retired or removed *by the Commission*." Nev. Const. art. 6, § 21(1) (emphasis added). This adjudicative function includes, but is much more than, mere fact-finding. It simply cannot be seriously contended that the power "to censure, retire or remove," vested *in the Commission* by an amendment to Nevada's Judicial Article, does not now encompass the power to decide finally and conclusively questions related to censure, retirement and removal of a judge or justice, and to carry determinations respecting those matters into effect.[3] Thus it is not merely

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[3] With respect to the Commission's power to carry its determinations into effect, the following passage from *Goldman* appears particularly relevant:

> [T]he Nevada Constitution specifically empowers the commission to remove a judge from office for "willful misconduct, willful or persistent failure to perform the duties of his office or habitual intemperance. . . ." *See* Nev. Const. art. 6, § 21(6)(a). Further, the commission is authorized to retire a judge for advanced age or for a disabling mental or physical condition that is likely to be permanent in nature. *See* Nev. Const. art. 6, § 21(6)(b). The power to adjudicate and order the removal or retirement of a judge must necessarily imply the power to declare the office vacant. *See generally, Galloway v. Truesdell*, 83 Nev. 13, 422 P.2d 237 (1967). To the extent that the commission's exercise of this implied authority may have conflicted with any express ministerial duty imposed upon the governor by the legislature, the commission's power was clearly preeminent. *See Goldman v. Bryan*, 106 Nev. 30, 37, 787 P.2d 372, 377 (1990) (citing *Robison v. District Court*, 73 Nev. 169, 175, 313 P.2d 436, 440 (1957)). To hold otherwise would elevate form over substance.

Goldman, 108 Nev. at 303, 830 P.2d at 141.

that the Nevada Supreme Court has the constitutional power to fashion rules for the Commission that makes the Commission a true Court of the Judiciary within the judicial branch of government. The Nevada Constitution and the citizens of this state accomplished that task.

Furthermore, as this court has previously stated, the separation of powers requires the judiciary and not another branch of government to administer judicial affairs. *See Dunphy v. Sheehan*, 92 Nev. 259, 266, 549 P.2d 332, 336-37 (1976) (promulgation of Code of Judicial Ethics is essential to the due administration of justice and within the inherent power of the judicial department of this state). Thus, the creation of the Judicial Discipline Commission within the judicial branch of government is mandated by the separation of powers clause.

The Dissent observes that several state agencies exercise functions which may be described as quasi-judicial in nature. None of those agencies, however, have the kind of direct control over the judiciary itself which is vested in the Judicial Discipline Commission, a court constitutionally created as part of the judicial branch of government. This power to control the judiciary has been constitutionally placed within the judicial branch of government, specifically in the Commission, and it may not be directed by the executive branch without offending the doctrine of separation of powers.

The principle that a duty constitutionally entrusted to the judiciary cannot be exercised by one of the other branches of government is basic, black-letter law, appearing in standard legal reference works:

> Although executive or administrative officers or bodies may exercise powers of a judicial or quasi-judicial nature incidental to the exercise of their administrative functions, they may not exercise judicial authority, or interfere with the exercise thereof by the courts.

> . . . . [I]t is a well established and universally recognized rule of constitutional law that executive or administrative officers, boards, or commissions may not, by reason of their executive or administrative powers, exercise judicial authority, or control or interfere with the courts in the exercise by the latter of judicial functions.

16 C.J.S. *Constitutional Law* § 219 (1984). While the quoted section of the Corpus Juris Secundum goes on to explain that "[executive officers] may investigate and determine facts as an incident to the performance of their administrative functions," judicial discipline is *not* among the administrative functions of any executive office, but is the province of the Commission, constitutionally created as part of the judicial branch of government.

> [T]he power of the judiciary, stemming from the doctrine of separation of powers, must prevail to control its own members. Any decision by the Attorney General's office not to present [matters involving a judge's misconduct] to a grand jury involves a discretionary determination by the executive branch and cannot bind or affect the judicial branch in matters concerning the governance of the judiciary.

Matters of Yaccarino, 101 N.J. 342, 502 A.2d 3, 9 (1985).[4]

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[4] The Dissent correctly observes, "not every exercise of a function judicial in nature constitutes an exercise of judicial power." Nonetheless, it is evident that the Commission is empowered by the Constitution to exercise the inherent power of the judiciary to control the conduct of its own members. *See, e.g., In re DeSaulnier*, 360 Mass. 787, 279 N.E.2d 296 (1971); *see also* Nev. Const. art. 4, § 1; Nev. Const. art. 5, § 1; Nev. Const. art. 6, § 21; *Goldman v. Bryan*, 104 Nev. 644, 654 n. 7, 764 P.2d 1296, 1302 n. 7 (1988); *Goldberg v. District Court*, 93 Nev. 614, 572 P.2d 521 (1977); *Dunphy v. Sheehan*, 92 Nev. 259, 549 P.2d 332 (1976); *Lindauer v. Allen*, 85 Nev. 430, 456 P.2d 851 (1969); *State v. District Court*, 85 Nev. 485, 457 P.2d 217 (1969); *St. Ex Rel. Watson v. Merialdo*, 70 Nev. 322, 268 P.2d 922 (1954).

The Dissent further declares: "The relationship of the Supreme Court to the Nevada Commission on Judicial Discipline is virtually the same as its relationship to the State Bar Disciplinary Boards and Hearing Panels except that the powers over the Bar are not expressly granted in the Constitution, but are deemed inherent powers." The Dissent's analogy is flawed.

The disciplinary boards and hearing panels of the state bar conduct individual attorney disciplinary proceedings and tender *findings and recommendations* to this court respecting the imposition of public discipline including the sanctions of suspension and disbarment. If the 1976 amendments to the Nevada Constitution had created a Commission similar to the recommendatory judicial disciplinary systems presently in place in California and other states cited in the Dissenting Opinion, then the comparison with the state bar disciplinary function might have some force. Indeed, the recommendatory systems of judicial discipline in California and many other states have much in common with the procedures that govern attorney discipline in Nevada. For example, pursuant to SCR 105(3)(b), a decision of a hearing panel recommending suspension or disbarment is automatically appealed to the supreme court. Moreover, SCR 102(1) and (2) specifically provide that only the supreme court may order the disbarment or suspension of an attorney. Thus, like a judge facing discipline in a state with a recommendatory system of judicial discipline like California's, an attorney facing discipline under Nevada's attorney discipline system can only be suspended or disbarred from the practice of law by the state's supreme court.

The inescapable fact remains, however, that the 1976 amendments to the Nevada Constitution *did not create such a recommendatory system of judicial discipline* in this state. Thus, the Dissent's attempt to analogize attorney and judicial discipline procedures is not only insupportable, but somewhat unsettling inasmuch as it sets

forth an analysis that appears oblivious to the fundamental structure of both Nevada's attorney and judicial disciplinary procedures.

What the Dissent fails to appreciate is that Petitioner Whitehead is entitled to a judicial discipline proceeding free from the serious conflicts and constitutional improprieties created by the Attorney General's association with the case precisely because the Nevada Commission on Judiical Discipline possesses the broad constitutional power to issue a *final* decision. Citing to the Commentary to Rule 4 of the 1993 proposed draft of the ABA Model Rules for Judicial Disciplinary Enforcement, the Dissent declares: "[A]lthough the separation of investigatory and prosecutorial functions is desirable, such separation is 'not constitutionally mandated.'" The Dissent, however, overlooks the reason *why* such internal separation of judicial discipline functions of most state commissions is "not constitutionally mandated." As the Report of the ABA Subcommittee recommending the proposed Model Rules also observes, systems of judicial discipline which combine all functions—investigation, prosecution, hearing and decision making—in a single process have *"survived due process challenges because in this type of system the highest court has the ultimate authority to review de novo and impose sanctions."* *See* Majority Report of Joint Subcommittee on Judicial Discipline on Model Rules for Judicial Disciplinary Enforcement at 3 (August 1994).

As noted above, and as the Attorney General herself has repeatedly emphasized in the instant case, this court decided in *Goldman* that "the Nevada Constitution does not contemplate this court's *de novo* or independent review of factual determinations of the commission on appeal." Thus, the analysis set forth in the Dissent fails to appreciate the substantial due process implications arising from the critical distinctions between a "recommendatory" system of judicial discipline, and the system established

under the Judicial Article of the Nevada Constitution. Under Nevada's system, where the state's highest court is foreclosed from conducting *de novo* or independent review of factual findings of the Commission, increased vigilance and careful scrutiny of the procedures employed by the Commission are essential to assure that an accused judge is accorded the fundamental fairness to which he or she is entitled under the Due Process Clause of the Constitution.

The Dissent's analysis also apparently overlooks other crucial distinctions between the state bar's disciplinary panels and the Judicial Discipline Commission. The state bar is emphatically not, as the Dissent points out, an "independent body created . . . by the people of the State of Nevada" as a part of the judicial branch of government; it does not draw its power from constitutional enabling provisions. Rather, the state bar is under the exclusive jurisdiction and control of the supreme court. *Compare* Nev. Const. art. 6, § 21 (constitutional referendum creating Judicial Discipline Commission) *with* NRS 7.275 (statute continuing state bar as a public corporation under the exclusive jurisdiction and control of the supreme court) and SCR 99 and 103 (Supreme Court Rule creating state bar disciplinary boards and hearing panels within the "exclusive disciplinary jurisdiction of the supreme court").

More importantly, the disciplinary panels of the state bar *do not* possess the same final, independent authority over attorneys that the Commission possesses over judges. The state bar disciplinary panels have no authority to suspend or disbar attorneys; they merely *recommend* such discipline to this court, which retains the ultimate power to impose any appropriate sanction. By contrast, and as emphasized above, in the absence of an appeal by the aggrieved judge, the Nevada Judicial Discipline Commission has final, independent authority to censure, remove or retire a judge. *Compare Goldman*, 108 Nev. at 266,

830 P.2d at 117 (Commission decision to censure, remove or retire is not merely advisory or recommendatory but is of independent force and effect absent perfection of an appeal; constitution does not contemplate this court's *de novo* or independent review of factual findings of Commission on appeal) *with In re Kenick*, 100 Nev. 273, 680 P.2d 972 (1984) (Supreme Court Rules cannot be construed to limit supreme court's power to suspend or disbar; court is not bound by the findings and recommendations of the disciplinary board and must examine the record anew and exercise its independent judgment).

The Dissent relies on California and North Carolina precedent for the proposition that "case law indicates that several states have sanctioned the use of state Attorneys General for various functions in judicial discipline cases" (Dissent page 7). *See Wenger v. Commission on Judicial Performance*, 29 Cal.3d 615, 175 Cal.Rptr. 420, 422 n. 3, 630 P.2d 954, 956 n. 3 (1981); *Spruance v. Commission on Judicial Qualifications*, 13 Cal.3d 778, 119 Cal.Rptr. 841, 844 n. 5, 532 P.2d 1209, 1212-13 n. 5 (1975); *In re Hardy*, 294 N.C. 90, 240 S.E.2d 367 (1978); *In re Stuhl*, 292 N.C. 379, 233 S.E.2d 562 (1977). The Dissent's reliance on the cited cases is misplaced because: (1) the separation of powers issue was simply not raised or addressed; (2) the attorneys general involved in these cases were not performing the kinds of multiple roles seen in this case; and (3) unlike Nevada, the systems of judicial discipline applicable in these jurisdictions are "recommendation" systems in which the state's highest court has the ultimate authority to review commission decisions *de novo* and impose sanctions.

More specifically, the Dissent cites *Wenger* and *Spruance* as examples of instances where attorneys general acted in multiple capacities during judicial discipline proceedings, assuming the roles of examiners, investigators, prosecutors and counsel to the commissions on appeal or in proceedings attacking the legal correctness of the commissions'

actions. In *Wenger* and *Spruance*, however, it is clear that it is the California Supreme Court, and not the California Commission, which makes the final decision to censure, retire or remove the accused judge, although this power is contingent upon the recommendation of the Commission. In Nevada, by contrast, the Commission may itself order the censure, removal or retirement of a judge (ARJD 30(2)); the judge *may* then appeal this final decision to this court. Consequently, even though an attorney general may be utilized in California as the Dissent contends, the conflicts of interest created by an attorney generals acting in multiple roles are far more significant in Nevada where, unlike California, the attorney general has been serving as an investigator, a prosecutor, *and as counsel for the very tribunal empowered to issue a final decision respecting judicial misconduct.* As the *Spruance* opinion notes, the California Commission appears before the California Supreme Court, the final arbiter of all judicial discipline, in an adversarial role, and the examiners—which may be attorneys general—appear "merely as counsel to [the] respondent" Commission. Further, although the *Wenger* and *Spruance* opinions show that an examiner, who may be an attorney general, may act as a presenter of evidence before the Commission, and as counsel for the Commission before the California Supreme Court, the opinions do not provide specific support for the proposition that deputy attorneys general may act in these two roles at the same time.

A similar analysis applies to the two North Carolina cases cited in the Dissent. *See In re Hardy*, 294 N.C. 90, 240 S.E.2d 367 (1978); *In re Stuhl*, 292 N.C. 379, 233 S.E.2d 562 (1977). In *Hardy*, a deputy attorney general was utilized to present charges to a judicial discipline commission. In *Stuhl*, a deputy attorney general represented the judicial discipline commission in an adversary proceeding. However, a careful reading of these cases reveals that North Carolina follows the same scheme to which California adheres, namely, the judicial discipline

commission in the cited cases merely recommends discipline, and the actual order to discipline is entered by the state supreme court. Thus, the cases are not applicable to the instant case for the same reasons discussed above.

The Dissent also protests that no actual conflicts of interest have been established or identified as a result of the Attorney General's staff having acted as investigator, prosecutor, legal counsel to the Commission, and appellate advocate for the Commission in this matter. The Dissent perceives no evidence contradicting the averments of Special Deputy Attorney General Campbell and Assistant Attorney General Nielsen that Campbell was not in any way connected with or beholden to the Attorney General's Office. Much more than a mere "fanciful scenario," however, supports the Majority's conclusions. For example, a cursory review of the Commission's minutes, Campbell's billings, and the affidavits, statements, and exhibits discloses that Campbell was deputized as a member of the Attorney General's staff, is contractually bound to serve "at the pleasure of the Attorney General" and is contractually bound to "report regularly to the Attorney General concerning the status of [this] case." *See Whitehead v. Comm'n on Jud. Discipline*, 110 Nev. ——, ——, 873 P.2d 946, 954 (1994).

The dissent also brands as "mere speculation" the Majority's concern that the Attorney General's office could present cases before the very judges her office is investigating or supervising.[5] The case of Judge D——, how-

[5] *United States v. Hastings*, 681 F.2d 706, 710-11 (11 Cir.1982), *cert. denied*, 459 U.S. 1203, 103 S.Ct. 1188, 75 L.Ed.2d 434 (1983), cited in the Dissent, is inapposite. The judge in *Hastings* sought judicial *immunity* from a federal criminal prosecution. The Majority Opinion obviously does not immunize judges from judicial discipline—it merely concludes that the Attorney General may not act as legal advisor or prosecutor in judicial discipline matters. Moreover, the Majority Opinion expressly states that the "Attorney General is constitutionally authorized to pursue *criminal* investigations and prosecutions of judges or justices."

ever, outlined in the Majority Opinion in *Whitehead II*, presents precisely such a scenario. Judge D—— was placed under the supervision of the Attorney General's office which had the power to conduct ongoing "follow-up examinations" including contacting witnesses. *Id.*, 110 Nev. at ——, 873 P.2d at 970. This ad hoc probationary scheme obviously creates at a minimum the appearance of impropriety, if not an inference of actual bias.

The Pennsylvania Supreme Court was faced with a similar situation. *See In Interest of McFall*, 533 Pa. 24, 617 A.2d 707 (1992). *McFall* involved appeals by some twenty-nine criminal defendants who charged that they had been denied their right to a fair and impartial tribunal because the judge who presided over their trials was assisting in an FBI investigation. *Id.* 617 A.2d at 711. The FBI had previously caught the judge accepting a monetary gift from a potential litigant and had obtained the judge's cooperation in its investigation by promising to tell any other investigating or prosecuting body of the judge's full cooperation. *Id.* The Pennsylvania Supreme Court affirmed the intermediate appellate court's order granting all twenty-nine criminal defendants a new trial because the defendants' "rights to an impartial tribunal [had] been trampled upon" and because the court concluded "that the appearance of impropriety compels us to affirm the grant of new proceedings in view of the blatant potential conflict of interest of the trial judge." *Id.* at 712. The court went on to note "[o]ne could reasonably conclude that, under the circumstances, [the judge]'s cooperation with the United States Attorney's office cast her in the role of a confederate of the prosecutors in the appellees' cases." *Id.* at 713.

Although the Dissent perceives this type of potential conflict of interest to be a mere "specter," it should be noted that there are two motions in criminal cases currently pending before this court in which the appellants seek to discover whether Judge D—— or any other judge who is or has been subject to informal probation under

the supervision of the Attorney General's office presided over any portion of their criminal trials. Obviously if these appellants were prosecuted by the Attorney General's office before judges like Judge D—— who were simultaneously being "supervised" by the Attorney General's office—this court would have to consider whether those appellants, like the appellants in the *McFall* case, were denied a fair and impartial tribunal. The instant Majority Opinion seeks to avoid having this court placed in the unenviable position that the Pennsylvania Supreme Court found itself, *i.e.*, having to order new proceedings in dozens of criminal cases because of the appearance that the judge who presided over those cases might be beholden to the prosecution.

Finally, the Dissent raises First Amendment concerns as a kind of all-purpose panacea against the Majority's desire to appoint a special master to investigate the cause of leaks of confidential information in derogation of Petitioner's constitutional rights. Although this expression of concern with the First Amendemnt might be an effective strategy for swaying public opinion, it has no legitimate legal basis.

Put quite simply, the First Amendment does not stand for the proposition that one who is under a duty not to reveal confidential information may breach this duty with impunity. *See, e.g., Landmark Communication, Inc. v. Virginia*, 435 U.S. 829, 837 n. 9, 98 S.Ct. 1535, 1540 n. 9, 56 L.Ed.2d 1 (1978) (statute imposing criminal liability for breach of confidential judicial discipline proceedings might well be constitutional under the First Amendment if it is applicable only to direct participants in a judicial discipline inquiry); *United States v. Richey*, 924 F.2d 857 (9th Cir.1991) (government may properly limit speech when compelling government interests outweigh free expression interests of speaker); *Kamasinski v. Judicial Review Council*, 797 F.Supp. 1083 (D.Conn. 1992) (state's interest in prohibiting disclosure prior to

determination of probable cause is sufficiently compelling to survive the strictest First Amendment scrutiny).[6]

Moreover, a duty of confidentiality can be lawfully imposed and enforced where a breach of confidentiality is in derogation of the constitutional rights of the party meant to be protected thereby. As the United States Supreme Court stated in *Sheppard v. Maxwell*, 384 U.S. 333, 363, 86 S.Ct. 1507, 1522-23, 16 L.Ed.2d 600 (1966):

> The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only *subject to regulation, but is highly censurable and worthy of disciplinary measures.*[7]

(Emphasis added.)

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[6] *See also Kamasinski v. Judicial Review Council*, 843 F.Supp. 811 (D.Conn.1994); *Vassiliades v. Garfinckel's, Brooks Bros.*, 492 A.2d 580 (D.C.Ct.App.1985) ("[a] defendant is not released from an obligation of confidence merely because the information learned constitutes a matter of legitimate public interest."); *Cherne Indus., Inc. v. Grounds & Assoc.*, 278 N.W.2d 81, 94 (Minn. 1979) ("a former employee's use of confidential information or trade secrets of his employer in violation of a contractual or fiduciary duty is not protected by the First Amendment").

[7] It should be noted that the decision of the United States Supreme Court in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991), is not contrary authority to our decision on this issue. The *Gentile* decision involved attorney speech which was censured, not because it implicated the breach of a duty of confidentiality, but because it was substantially likely to prejudice materially an adjudicative proceeding. Moreover, a majority of the Supreme Court in *Gentile* specifically held that the proscription of speech there involved did satisfy the First Amendment. The rule was held unconstitutional as applied on vagueness grounds only.

If collaboration between counsel and the press is "subject to regulation . . . highly censurable and worthy of disciplinary measures" how much more would collaboration between a sitting judge and the press be worthy of such censure? *Whitehead I* ruled that the Judicial Discipline Commission constitutes a "Court of Judicial Performance and Qualifications" (despite the Dissent's objection to this ruling, it is obvious, given the Commission's authority to issue a final order censuring, removing or retiring a judge, that the Commission members are very real "judges" over petitioner). I need not belabor the obvious point that a judge, by virtue of his or her office, is prohibited from exercising certain First Amendment rights otherwise enjoyed by the general citizenry, namely, the right to comment on a pending case, even though that case may clearly implicate matters of great public concern. *See* Nevada Code of Judicial Conduct, Canon 3B, § 9. Judges are certainly not entitled to divulge confidential information learned in the course of their official duties; and they may be subject to disqualification, at the very least, for making public statements indicative of bias against a litigant.

In this regard, it must be remembered that the tone and effect of the news coverage of this matter has clearly been indicative of hostility towards Petitioner on the part of whomever made the leaks to the press. If such party is a member of the Judicial Discipline Commission who will sit in judgment over Petitioner, it cannot be expected that Petitioner will be given a fair hearing. Accordingly, the appointment of a master is necessary to protect Petitioner's constitutional rights to an impartial tribunal.

ATTORNEY GENERAL DEL PAPA'S DISQUALIFYING MISCONDUCT IN THIS CASE

Even if the Dissent were correct in saying that there are no constitutional or conflict-of-interest bars to the Attorney General's continuing to act in the role of legal

advisor and prosecutor in this case, I believe that there is another independent basis for disqualification of Attorney General Del Papa in the *Whitehead* case. Attorney General Del Papa should not be permitted to act as counsel in any capacity in this case, because she has displayed such animus, such a publicly-proclaimed antipathy toward the "defendant" judge in this case that she has rendered herself and her office unsuitable and incapacitated to serve as a prosecutorial advocate in the judicial discipline case involving Judge Whitehead. The Attorney General appears to have forgotten that her "primary duty is not to convict, but to see that justice is done" and that "cases must be tried in the courtroom rather than in the media." *Williams v. State*, 103 Nev. 106, 110, 111, 734 P.2d 700, 703 (citations omitted). The Attorney General's running public comments on this case display a continuous effort to influence public opinion against Judge Whitehead. Not only is this conduct ethically unacceptable, it is in direct violation of ARJD 8.[8] ARJD 8 is a very clear and explicit court rule which has been flouted by the Attorney General. This rule expressly commands that all counsel in judicial discipline matters, "at all times," refrain from engaging in "*any private or public discussion*" which relates to the merits of any judicial discipline matter or which might "*prejudice a [judge's] reputation or rights to due process.*" (Emphasis added.)

For most of the time that this case has been pending the Attorney General has been engaging in "public discussion[s]" of one kind or another about the case, saying over and over again that Judge Whitehead was charged wtih "serious misconduct" and issuing public statements that rather clearly violate ARJD 8. Rather than attempt-

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[8] ARJD 8 provides, in pertinent part, that Commission counsel "must refrain from any public or private discussion about the merits of any pending or impending matter, or discussion which might otherwise prejudice a [judge's] reputation or rights to due process."

ing to catalogue the various violations of ARJD 8, I will rely in making my point on one very obvious and, may I say, flagrant example of the manner in which Attorney General Del Papa has defied this court rule. The Attorney General's press release of January 31, 1994, epitomizes her refusal to abide by the rules. In this statewide press release, issued to all public news media sources, the Attorney General publicly accuses the judge of lying ("misrepresentation"), slander ("smearing others") and tampering with the justice system ("going around and above the law").[9] The Attorney General has waged a public opinion war against Judge Whitehead and in public statements and press releases has repeatedly attempted to "try her case" in the media. The January 31 release is probably the worst and most undeniable example of the Attorney General's misconduct.

Presumably the Attorney General is aware of the contents of ARJD 8 and aware that she is obliged to refrain from such "public . . . discussion[s]" and that she must not do or say anything that will "prejudice a [judge's] reputation or rights to due process." Can anyone doubt that publicly calling a judge a liar or slanderer or publicly accusing a judge of going "around and above the law" does not "prejudice" the judge's reputation—especially when such statements go to every news source in the state and *are made by none other than the Attorney General of the State of Nevada?* Can anyone doubt that Judge Whitehead's "due process rights" before the Commission have not been damaged by the Attorney General's conduct? It may be that notwithstanding the history of this case there is some possibility that Judge Whitehead might somehow be afforded due process in the future, I do not

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[9] The actual public charges made by Attorney General Del Papa against Judge Whitehead are that (1) the judge was guilty in this case of "gross misrepresentations of fact," (2) that he was guilty of "smearing others in order to try desperately to save himself," (3) that the judge had gone "around and above the law, and (4) that "even Judge Whitehead was not above the law."

know; but one thing is clear and that is that, given the damage that Attorney General Del Papa has done to Judge Whitehead's reputation and the prejudicial effect that damage necessarily has had on Judge Whitehead's due process rights, we cannot, entirely apart from any consideration of constitutional incapacity or conflict of interest, allow Attorney General Del Papa to continue to act in any capacity in this case. The Attorney General's misconduct, by itself, and independent of the two grounds stated in the Majority Opinion, requires that she be removed from any contact with this case at once.

In *Collier v. Legakes*, 98 Nev. 307, 646 P.2d 1219 (1982), we recognized that the "disqualification of a prosecutor's office rests with the sound discretion of the district court" and that "[i]n exercising that discretion, [the court] should consider all the facts and circumstances and determine whether the prosecutorial function could be carried out impartially. . . ." *Id.* at 309-10, 646 P.2d at 1220 (citations omitted). I cannot imagine how the Attorney General, who has also been acting as both Judge Whitehead's prosecutor and the Judicial Commission's legal counsel can, given the pattern of her manner of handling this case and the inexcusable issuance of the press release of January 31, 1994, possibly be able to carry out the prosecutorial function "impartially" in this case. I do not see how it can be denied that the Attorney General is clearly unable to act "impartially" with regard to a man whom she called "desperate" and whom she has publicly branded as a liar and slanderer who is trying to escape his just deserts by going "around and above the law." In my opinion, her flagrant violation of court rules, her public comments on a pending judicial discipline case, and her prejudicial public statements against Judge Whitehead all combine to deny Judge Whitehead any possibility of receiving fair treatment and due process for so long as Attorney General Del Papa, her staff or her special prosecutor have anything to do with this case. I would disqualify her on this ground alone.

I am not ready at this time to pass judgment on what penalties should be meted out as a result of the Attorney General's flouting of ARJD 8, but I am convinced that her actions relative to this case disqualify her from proceeding another day as the prosecutor or in any other capacity on this case.

SHEARING, Justice, dissenting:

I do not agree that the Attorney General, the Assistant Attorney General or the special counsel hired by the Nevada Commission on Judicial Discipline should be disqualified from appearing in this proceeding or any disciplinary proceeding now pending before the Commission. The grounds which the majority and the concurrence allege require the disqualification of the Attorney General are (1) violation of the separation of powers doctrine, (2) conflicts of interest and (3) misconduct amounting to violation of due process. None of these grounds is supported in law or fact.

SEPARATION OF POWERS

There is no basis in the Nevada Constitution, the Nevada statutes or the rules adopted by this court for holding that the Nevada Commission on Judicial Discipline lacks the authority to seek the assistance of the Attorney General's office for legal advice and representation. On the contrary, the Commission is specifically authorized to do so. The legislature enacted NRS 1.450(2) directing the Attorney General to provide, upon request of the Judicial Discipline Commission, legal counsel in any investigation or proceeding of the Commission. The majority would have this statute declared unconstitutional in violation of the doctrine of separation of powers.

Article 3, Section 1 of the Constitution of the State of Nevada provides:

> Three separate departments; separation of powers. The powers of the Government of the State of Nevada shall be divided into three separate departments, —the Legislature,—the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases herein expressly directed or permitted.

There is no dispute that Nevada has adopted the traditional separation of powers doctrine which provides the checks and balances necessary to prevent any one branch of government from becoming all-powerful and tyrannical. Each branch has the exclusive authority to exercise the powers delegated to it. Legislative power is the power to set the policies of the state through its enactments and the allocation of funds. *See Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967). Executive power is the power to enforce and implement the policies of the state as set forth by the legislature. *Id.* Judicial power is the power to interpret legislation, to hear and determine justiciable controversies and to enforce any valid judgment, decree or order. *Id.*

This does not mean that there is a wall between any of the branches preventing them from interacting. On the contrary, the structure of government is such that the branches must interact. That is what keeps any one branch from dominating the government. In The Federalist No. 47, responding to criticism that there was not sufficient separation of powers in the proposed federal constitution, James Madison stated:

> If we look into the constitutions of the several States, we find that, notwithstanding the emphatical and, in some instances, the unqualified terms in which this axiom [separation of powers] has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct.

More recently, the United States Supreme Court has stated, in *Morrison v. Olson*, that

> [T]he system of separated powers and checks and balances established in the Constitution was regarded by the Framers as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." We have not hesitated

> to invalidate provisions of law which violate this principle. On the other hand, we have never held that the Constitution requires that the three branches of Government "operate with absolute independence." In the often-quoted words of Justice Jackson: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."

487 U.S. 654, 693-94, 108 S.Ct. 2597, 2620, 101 L.Ed. 2d 569 (1988) (citations omitted).

And in *Buckley v. Valeo,* the United States Supreme Court stated:

> [I]t is also clear from the provisions of the Constitution itself, and from the Federalist Papers, that the Constitution by no means contemplates total separation of each of these three essential branches of Government. . . . The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.

424 U.S. 1, 121, 96 C.Ct. 612, 683, 46 L.Ed.2d 659 (1975) (per curiam).

Neither does the doctrine of separation of powers mean that the legislature or the constitution may not assign fact-finding functions in disputes to agencies in branches of government other than the judiciary. There are numerous state agencies which perform quasi-judicial functions, agencies such as the State Industrial Insurance System, the Board of Medical Examiners, Board of Parole Commissioners and Real Estate Commission, to name a few.

The adjudicatory decisions made by these agencies affect the fundamental rights of individuals, and absent an appeal to the courts, are final, with the full force and effect of law. The majority states "A member of the executive branch is simply not constitutionally permitted to act in a judicial capacity." Fortunately, the majority is wrong. If the majority's implication that agency adjudication violates the separation of powers doctrine were correct, the overwhelming majority of government would be unconstitutional.

It has long been settled that the exercise of duties that are judicial in nature is not necessarily an exercise of the judicial power of the state and therefore does not violate the separation of powers doctrine. In *Sawyer v. Dooley*, 21 Nev. 390, 396, 32 P. 437, 439 (1893), this court stated regarding Article 3, Section 1 of the Nevada Constitution:

> These departments are each charged by other parts of the constitution with certain duties and functions, and it is to these that the prohibition just quoted refers. For insance, the governor or the judiciary shall not be members of the legislature, nor shall they make the laws under which we must live. But this is quite a different thing from saying that no member of the executive or judicial departments shall exercise powers in their nature legislative, but which are not particularly charged by the constitution upon the legislative department; such as where the board of commissioners for the insane makes rules for the management of the asylum, or a court establishes rules for the transaction of the business coming before it. It would be impossible to administer the state government were the officers not permitted and required, in many instances, to discharge duties in their nature judicial, in that they must exercise judgment and discretion in determining the facts concerning which they are called upon to act, and in con-

> struing the laws applicable to them. Hence we see no constitutional objection to members of the executive branch being charged with the duty of assessing property, or of acting upon the board of equalization, for neither of these functions have been, either expressly or impliedly, placed by the constitution upon either of the other departments; for certainly, although in equalizing valuations a board may act in a judicial capacity, the constitution nowhere contemplates that the judicial department, as organized by article 6, shall discharge that duty.

Thus, it is clear that not every exercise of a function judicial in nature constitutes an exercise of judicial power, which power the constitution states is not to be performed by other branches of government. In *Bergman v. Kearney*, 241 F. 884, 898 (D.Nev.1917), the court stated: "Judicial power, in the constitutional sense, is something more than authority to hear and determine; it includes the power to decide finally and conclusively, and also power to carry its determination into effect." This power does not rest in any agency or commission, unless the agency or commission or the party before it, agrees to accept the result with resort to the courts. The Nevada Constitution makes clear that the judicial power of this state rests exclusively in the courts. Article 6, Section 1 states:

> Judicial power vested in court system. The Judicial power of this State shall be vested in a court system, comprising a Supreme Court, District Courts, and Justices of the Peace. The Legislature may also establish, as part of the system, Courts for municipal purposes only in incorporated cities and towns.

What is now Article 6, Section 21 of the Nevada Constitution, entitled *Commission on Judicial Discipline*, began as a proposed Constitutional amendment in the 1973 legislature. Following the procedure for constitutional amendment established by Article 16 of the Nevada Constitution, the elected representatives of the state voted

in 1973 and again in 1975 in favor of the proposed amendment. Finally, in November of 1976 the amendment was ratified by direct vote of the people.

Prior to 1976 the people of Nevada had no effective remedy for judicial misconduct falling short of criminal behavior. The traditional checks and balances in our constitutional organization were not adequate to curb the abuses of power by members of the judicial branch. Judicial misconduct was, by and large, entirely beyond the jurisdiction of the executive branch, the legislative branch and all existing administrative agencies. Only the justices of the Supreme Court could impose discipline on judges of the state.

That the people of Nevada believed that the Supreme Court had not, and could not, effectively police judicial misconduct is not surprising. Judges and justices, following their constitutional mandate, hear and determine questions in controversy that are properly brought before them. *See Galloway v. Truesdell,* 83 Nev. 13, 20 422 P.2d 237, 242 (1967). In carrying out their duties, judges, unlike legislators and especially unlike executive branch officials, do not ordinarily have occasion to investigate complaints of misconduct, much less to prosecute after determining that the complaints have merit. In striking down a statute which placed the judges in a position of investigator, this court warned. "Centuries of common law tradition warn us with echoing impressiveness this is not a judge's work." 83 Nev. at 29, 422 P.2d at 248.

Furthermore, in a small state like Nevada, the justices and judges usually know one another personally. Thus, except in the case of the rare errant judge without strong personal ties of friendship with the judicial community, it was nearly psychologically impossible for the justices to adopt, on their own initiative, the rule of investigator and prosecutor of judicial misconduct. The result was a dissatisfied public and the adoption of Article 6, Section 21 of the Nevada Constitution.

In adopting and ratifying Article 6, Section 21, the people of Nevada clearly intended to *remove* the non-criminal judicial misconduct from the judiciary. In so doing, they clearly intended to leave the judiciary with less power and greater accountability. The one difference in the Nevada Commission on Judicial Discipline from most other agencies is that it was designed to have greater independence. The members are not selected by any one branch of government. The Governor appoints three members, the Supreme Court appoints two members and the Board of Governors of the State Bar appoints two members. In addition, if the state bar ceases to exist as a public corporation, the legislature must determine how the attorney members are appointed.

In the *Whitehead* opinions issued thus far, the majority of this court argues that this could not have been the intent of the people because the provision creating the Judicial Discipline Commission was placed in Article 6 of the Nevada Commission entitled "Judicial Department." Therefore, according to the majority's reasoning, because of the provision's placement and because the Commission also has some "quasi-judicial" powers, the Commission must be a court exercising the judicial power vested in the court system by Article 6, Section 1.

This analysis does not survive a careful review of Article 6, which contains twenty-one sections ranging in title from "Judicial Power vested in court system" to "One form of civil action" to "Fees or perquisites of judicial officers." First, when the voters added section 21 to the Constitution, Section 1 of Article 6, which vests the judicial power in the courts, was *not* amended to include the Judicial Discipline Commission in the list of courts authorized to exercise the judicial power of the state. This should be dispositive of the issue.

Furthermore, the contents of the other sections make clear that not all powers created in Article 6 relate to the exercise of judicial power. What the twenty-one sec-

tions have in common is that each section impacts in some way on the judicial branch of government. For example, Section 15 grants power to the legislature to fix the salaries of state judges and justices. It makes no more sense to state that the Judicial Discipline Commission is part of the judicial branch of government because it receives its powers from a section placed in Article 6 than it does to say that the legislature is part of the judicial branch of government because it too is the recipient of powers granted by a sesction of Article 6. Constitutional law does not depend upon principle of legislative indexing.

This court has recognized that the attorneys of this state are an integral part of Article 6. Such recognition is embodied in Supreme Court Rule 39, which provides:

> Inherent powers of courts. Attorneys being court officers and essential aids in the administration of justice, the government of the legal profession is a judicial function. Authority to admit to practice and to discipline is inherent and exclusive in the courts. The supreme court rules set forth in this Part III are the exclusive rules for the governing of the legal profession in Nevada.

Yet no one has suggested that because attorneys are officers of the court, they are part of the judicial branch and are therefore disqualified from representing or serving in the executive or legislative branches of government.

The judicial power, for constitutional purposes, can be found where it was placed by Article 6, Section 1 when the Nevada Constitution was ratified in 1864: in a "court system, comprising a Supreme Court, District Courts, and Justices of the Peace. . . ."

Justice Springer, in his concurring opinion, offers another reason why he believes that Article 6, Section 21 must be interpreted as placing the Judicial Discipline Commission in the judicial branch of government: if it

were not so read, Article 6, Section 21 would violate the separation of powers clause, and thus, by implication, be unconstitutional. In support of this proposition, Justice Springer cites *Dunphy v. Sheehan,* 92 Nev. 259, 266, 549 P.2d 332, 336-37 1976).

There are at least three problems with this analysis. First, it is an oxymoron to state that a duly-ratified constitutional amendment can, at the time of its passage, violate that same constitution. It is one of the best-established principles of constitutional interpretation that in the case of a clear conflict between a constitutional amendment and another constitutional provision already existing at the time the amendment is ratified, the amendment, being the later expression of will of the lawmaker, must prevail. *Schick v. United States,* 195 U.S. 65, 68-69, 24 S.Ct. 826, 826-27, 49 L.Ed. 99 (1904). Thus, had the language of Section 21 placed the Judicial Discipline Commission entirely within the executive or legislative branch, neither Article 3, Section 1, nor any then-existing constitutional provision could be held to invalidate the new amendment.

Second, the court in *Dunphy* merely stated, in dicta no less, that the *promulgation* of a Code of Judicial Ethics, not the *enforcement* of such a code, is "within the inherent power of the judicial department of this state." 92 Nev. at 266, 549 P.2d at 336-37 (1976). Since promulgation of the Code of Judicial Ethics remains today in the judicial branch of government, the decision is irrelevant regarding the creation of the Judicial Discipline Commission.

Finally, the *Dunphy* case was decided April 29, 1976, several months before Article 6, Section 21 was ratified in the November 1976 elections. Thus, even if *Dunphy* could be read to immunize the judiciary from judicial disciplinary proceedings from non-judicial bodies, the case would have been explicitly overruled by the voters as of November 1976.

Justice Springer also seems to believe that there is an inconsistency between the view that the Commission does not exercise the judicial powers of the State and the opinion in *Goldman v. Nevada Comm'n on Judicial Discipline*, 108 Nev. 251, 830 P.2d 107 (1992). There is no inconsistency whatsoever. The issue in *Goldman* was the scope of review, not whether judicial power rested in the Commission, and not whether the Commission was a "Court of Judicial Performance and Qualifications." *Goldman* held that this court must accord Commission findings a deferential standard of review. This is no different than the deference this court must grant other state agencies by statute, *See* NRS 233B.135.[1] Additionally, there is no dispute that the Commission has broad power to discipline judges and that its orders are final unless appealed to this court. The same is true of most state agencies. Thus, Justice Springer's discussion regarding Commissioners in other states and the fact that they only have power to make recommendations to the court rather than have final decision-making power is irrelevant to the instant case.

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[1] This court held in *Goldman* that it would not undertake *de novo* —or independent—review of Commission decisions. 108 Nev. at 267, 830 P.2d at 117-18. In this respect, we adopted the same deferential type of review that we accord other agencies.

It is true that the prosecutor before the Commission, like the prosecutor before the Board of Medical Examiners (the Board), bears a higher burden than prosecutors in most agency determinations. In most agency determinations the burden below is substantial evidence. *See* NRS 233B.135. In professional discipline cases, on the other hand, the burden imposed below is higher, and we review those cases to determine whether the evidence presented at the hearing was sufficient to establish, by clear and convincing evidence, that the alleged violations had been proven. *See Goldman*, 108 Nev. at 264, 830 P.2d at 115 (stating that burden of proof before commission is clear and convincing evidence); *see also* NRS 630.352(1) requiring the Board to find violations by clear and convincing evidence before sanctioning a health provider).

Although we review the determinations of the Board and the Commission in accordance with the higher standards imposed on them by law and court rule, the fact that we do not engage in independent review is evidence that our review is deferential.

Specifically, *Goldman* does not support the sweeping proposition for which it is cited in *Whitehead I* that "the Commission is not to be regarded merely as an administrative agency but as a true 'Court of Judicial Performance and Qualifications.'" *Whitehead v. Comm'n on Jud. Discipline*, 110 Nev. 128, 161 n. 25, 869 P.2d 795, 816 n. 25 (1994). As stated, this court in *Goldman* merely held that the Judicial Discipline Commission is accorded the same deferential standard of review as any other state agency.

Since the Judicial Discipline Commission does not exercise the judicial power of the state, certainly the Commission's attorney would not be exercising that power, even if providing legal advice could properly be equated with serving as an "ex facto member of the Commission."

Furthermore, it can be stated as a general rule that the attorney providing legal advice does not take on the character, for constitutional separation of powers purposes, of the client being served. That is why the legislature could, without violating the constitution, order the Attorney General to represent any and all government officers, officials, agencies and even judges and legislators. *See* NRS 41.0339. In all branches of government, decision makers, and not their legal advisors, take responsibility for the decisions they make. Contrary to the majority's implication, there is nothing sinister about the Commission making decisions either consistent or inconsistent with the advice of an attorney from the Office of the Attorney General.

CONFLICTS OF INTEREST

The majority of this court also holds that the Attorney General is disqualified from representing the Commission because of conflicts of interest. The majority does not make clear under which constitutional provision it finds a conflict of interest which operates to nullify NRS 1.450(2). Some of the majority's language suggests that the institutional position of the Attorney General is so

rife with conflicts of interest with respect to the judicial branch of government that providing legal advice to the Commission violates the separation of powers clause. Other language suggests that in some way the petitioner's due process rights will be violated if the Attorney General represents the Commission. Both contentions rest, not on any actual conflict of interest evidenced in the instant case, but on specters of potential conflicts and misuses of power, as well as criminal activity.

The general rule regarding conflicts of interests for attorneys is stated in Supreme Court Rule 157 which provides as follows:

> Rule 157. Conflict of interest; General rule.
>
> 1. A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (a) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (b) Each client consents, preferably in writing, after consultation.
>
> 2. A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (a) The lawyer reasonably believes the representation will not be adversely affected; and
>
> (b) The client consents, preferably in writing, after consultation.
>
> When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

This rule would have some bearing on the majority's allegation that there is a conflict arising from the fact that the Attorney General is official counsel for the judges and justices of the state. In the event that a judge involved in disciplinary proceedings were in need of legal services, it is quite possible that the Attorney General would not be able to form a reasonable belief that the representation would not be adversely affected, mandating disqualification under SCR 157. The solution to this conflict, which can hardly be characterized as one of constitutional dimension, is simple and straightforward. Under NRS 41.03435, the Attorney General would, with the approval of the State Board of Examiners, employ an attorney from the private sector to act as special counsel for the judge or justice.

Supreme Court Rule 157 does not apply to disqualify the Attorney General from providing legal advice to the Commission under any of the conflicts of interest alleged by the majority. Yet, despite the absence of a constitutional violation, the majority would nullify an act of the legislature directing the Attorney General to represent the Commission on the basis of hypothetical conflicts. This court has no general authority to strike down an act of the legislature merely because it sees potential or actual conflicts of interest. In *State of Nevada v. Doron*, 5 Nev. 399 (1876) this court stated:

> [E]very statute is to be upheld unless plainly and without reasonable doubt in conflict with the constitution [and] the legislature has power to pass any law, not positively prohibited, or by clear implication forbidden by the constitution. . . .

Both Judge Guy in his concurrence in *Whitehead I* and the majority in this opinion rest their arguments on the assumption that Attorneys General will be unable to resist the temptation to engage in misconduct with respect to judges. The implication is that allowing NRS 1.450(2) to function as it has since it was enacted by the legislature

in 1977 will inevitably lead to an epidemic of politically-motivated persecutions of judges. This fanciful scenario may be possible, but does not warrant legal action unless there is some actual evidence of its occurring. Government operates on the principle that its officers and employees are persons of good will and honesty who not only follow the law, but their professional ethical obligations. We have been presented with no evidence that the executive officials have not been acting with professional integrity and etthics.

The majority view also ignores the very powerful disincentives to such conduct. An Attorney General or any attorney on the Attorney General's staff who initiated a prosecution motivated by "personal, partisan or political gain," or who attempted to hold a judge "hostage" to affect the outcome of a case, would be subject to prosecution under one or more of the following criminal statutes:

NRS 197.110	**Misconduct of public officer—a gross misdemeanor**
NRS 197.170	**Extortion of public officer—a felony**
NRS 197.200(2) (b)	**Oppression under color of office—a gross misdemeanor**
NRS 199.300(1) (b)	**Intimidating public officer, public employee, juror, referee, arbitrator, appraiser, assessor or similar person —a gross misdemeanor**
NRS 199.310	**Malicious prosecution—a felony or misdemeanor**
NRS 199.320	**Inducing lawsuit—a misdemeanor**
NRS 200.510	**Criminal libel—a gross misdemeanor**
NRS 200.560	**Threatening to publish libel—a gross misdemeanor**
NRS 205.320(4) & (5)	**Extortion—a felony**

If criminal prosecution were not enough of a deterrent, the violater could also be charged with the violation of SCR 101, 174, 179, 181, 201 and 203, which, if found

to be true, would almost certainly lead to disbarment under SCR 102. The law is well-equipped to deal with the extreme conduct that the majority seems to believe NRS 1.450(2) makes imminent.

The majority's argument, however, suffers from a more serious defect than the fear being out of proportion to the danger. The argument contains no limiting principle. It could be said of every district attorney in Nevada that he or she has the power to bring about prosecution of judges, of legislators and of private citizens for political reasons or to influence decisions. In fact, all government officials with significant power, including judges and justices, are in a position to attempt to abuse that power if they are so inclined. That does not justify this court in prohibiting, as a prophylactic measure, an official from executing the functions assigned to it by law. On the contrary, even if there are public officials who have abused their powers, they could only be kept from their assigned duties after procedures which ensure that the officials have received due process of law.

The majority would do well to heed the words of Justice Frankfurter in his concurrence in *In Re Groban's Petition*, 352 U.S. 330, 335-37, 77 S.Ct. 510, 514-15, 1 L.Ed.2d 376 (1957):

> To whatever extent history may confirm Lord Acton's dictum that power tends to corrupt, such a doctrine of fear can hardly serve as a test, under the Due Process Clause of the Fourteenth Amendment, of a particular exercise of a State's legislative power. And so, the constitutionality of a particular statute, expressive of a State's view of desirable policy for dealing with one of the rudimentary concerns of society—the prevention of fires and the ascertainment of their causes—and directed towards a particular situation, cannot be determined by deriving a troupe of hobgoblins from the assumption that such a par-

> ticularized exercise of power would justify an unlimited, abusive exercise of power.
>
> . . . .
>
> We are admonished from time to time not to adjudicate on the basis of fear of foreign totalitarianism. Equally so should we not be guided in the exercise of our reviewing power over legislation by fear of totalitarianism in our own country.

It is disingenuous for the majority to suggest that it is a conflict for the Attorney General to be privy to confidential information regarding judges and justices by virtue of representation of the Nevada Commission on Judicial Discipline while the Attorney General is not only free, but obligated, under NRS 41.0338, to represent judges in legal proceedings. The very same considerations apply in either scenario. When the Attorney General's office represents judges and justices in litigation, the deputies assigned are also in a position to learn privileged and confidential information. The specter presented of judges held "hostage" and basically subjected to extortion or blackmail is possible, but the mere speculation that such could occur is no basis for disqualification. A judge is conceivably subject to being held "hostage" and subject to extortion or blackmail by anyone—an attorney, a litigant, a family member or a total stranger.

When similar arguments were raised in the federal courts against allowing the Attorney General to prosecute judges criminally, the Eleventh Circuit Court of Appeals replied as follows:

> [The judge] contends that the courts would be subject to intolerable pressure from the executive if executive officers were allowed to prosecute active federal judges for acts involving the exercise of their judicial power.
>
> Appellant is of course correct that the independence of the judiciary from external pressures is a highly valued element of our constitutional system.

> That independence is already protected by *specific* provisions in the Constitution. . . . Additionally, judges enjoy the same protection as do all citizens from vindictive prosecution by officers of the executive branch. We are not persuaded that the proposed rule of absolute judicial immunity from federal criminal prosecution is a necessary complement to the Constitution's explicit protections. Indeed, the miniscule increment in judicial independence that might be derived from the proposed rule would be outweighed by the tremendous harm that the rule would cause to another treasured value of our constitutional system: no man in this country is so high that he is above the law.

(Citations and footnotes omitted). In the instant case, the hypothetical potential for abuses must also give way to the competing interest of assuring effective means of preventing abuse of judicial power.

In addition, the alleged conflict between giving legal advice to the Commission and also acting as prosecutor before the Commission has long since been resolved by this court. In *Laman v. Nevada R.E. Adv. Commission,* 95 Nev. 50, 56-57, 589 P.2d 166, 170 (1979), this court stated:

> Appellant contends that there was an improper commingling of judicial and prosecutorial functions during the Commission proceedings in that a Deputy Attorney General participated by advising the Commission on evidentiary matters, while his subordinate in the same office was engaged in prosecuting appellant. This contention, unsupported by case authority, is adequately answered by this court's ruling in *Rudin v. Nevada Real Estate Advisory Commission, supra,* 86 Nev. [562] at 565, 471 P.2d [658] at 660 [1970]:
>
> > It is not uncommon in administrative law to find the combination of investigating, prosecuting and judging functions. As a general propo-

> sition, such a combination, standing alone, does not constitute a denial of due process. 2 Davis, Administrative Law Treatise § 13.02. Such combination of functions possesses the potential for unfairness, but unfairness is not its inevitable consequence. In the matter at hand that combination did not exist. The investigation was conducted by investigators, the prosecution, by counsel for the Commission, and the decision was made by the Commission itself. There is nothing to suggest that the prosecutor decided the case.

To the extent that federal due process is said to be implicated, even if we assume that the Attorney General performed the roles of investigator, prosecutor, legal advisor and even adjudicator in this case,[2] the United States Supreme Court has answered clearly. In *Withrow v. Larkin*, 421 U.S. 35, 47-53, 95 S.Ct. 1456, 1464-68, 43 L.Ed.2d 712 (1975), the court stated:

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.
>
> Very similar claims have been squarely rejected in prior decisions of this Court. . . .
>
> More recently we have sustained against due process objection a system in which a Social Security ex-

[2] This assumption is contradicted by the respondents' affidavits.

aminer has responsibility for developing the facts and making a decision as to disability claims, and observed that the challenge to this combination of functions "assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity." *Richardson v. Perales,* 402 U.S. 389, 410 [91 S.Ct. 1420, 1432, 28 L.Ed.2d 842] (1971).

That is not to say that there is nothing to the argument that those who have investigated should not then adjudicate. The issue is substantial, it is not new, and legislators and others concerned with the operations of administrative agencies have given much attention to whether and to what extent distinctive functions should be performed by the same persons. No single answer has been reached. Indeed, the growth, variety, and complexity of the administrative processes have made any one solution highly unlikely. Within the Federal Government itself, Congress has addressed the issue in several different ways, providing for varying degrees of separation from complete separation of functions to virtually none at all. For the generality of agencies, Congress has been content with § 5 of the Administrative Procedures Act, 5 U.S.C. § 554(d), which provides that no employee engaged in investigating or prosecuting may also participate or advise in the adjudicating function, but which also expressly exempts from this prohibition "the agency or a member or members of the body comprising the agency."

It is not surprising, therefore, to find that "[t]he case law, both federal and state, generally rejects the idea that the combination [of] judging [and] investigating functions is a denial of due process. . . ." 2 K. Davis, Administrative Law Treatise § 13.02, p. 175 (1958). Similarly, our cases, although they re-

> flect the substance of the problem, offer no support for the bald proposition applied in this case by the District Court that agency members who participate in an investigation are disqualified from adjudicating. The incredible variety of administrative mechanisms in this country will not yield to any single organizing principle.

(Footnotes omitted.)

Because *Withrow*, like other United States Supreme Court precedent on federal due process, is controlling on the courts of all fifty states, it is not surprising that not one of the different procedures used for judicial disciplinary proceedings in the 50 states, including all that use the Attorney General for various functions, has ever been struck down as unconstitutional on due process grounds.

The majority regards Special Counsel Don Campbell as an "attache" or "functionary" of the Attorney General based on (1) the title "special deputy attorney general" given to Campbell after he agreed to serve on the case and (2) the March 25, 1993, contract between the State of Nevada, acting by and through the Attorney General, and Donald J. Campbell & Associates. The conclusion drawn by the majority is that Campbell's position is indistinguishable from that of a full-time salaried employee of the Office of the Attorney General. This conclusion elevates form over substance. The contract with Campbell is clearly a form contract used in any case requiring appointment of special counsel under the terms of NRS 41.03435. The majority in *Whitehead II* stated that "[t]his court will recognize a document for what it is, rather than the name associated with it." *Whitehead v. Comm'n on Jud. Discipline*, 110 Nev. ——, ——, 873 P.2d 946, 961 (1994). Following this wisdom, it is clear that the form contract tells little, if anything, about the role that Campbell played in this case. It represents the type of bureaucratic obstacle

that anyone from the private sector serving the state must sign in order to collect the modest financial remuneration which is allowed for such service.

The substance of special counsel Campbell's service is set forth in uncontradicted affidavits in the record. As a former state and federal prosecutor, he had substantial knowledge of and experience with proper investigatory and prosecutorial procedures. He discharged his investigatory duties personally, without relying on the use of agents and without sharing any factual findings with the Attorney General or any member of her staff. While a few conversations took place between Campbell and Assistant Attorney General Brooke Nielsen, all were of an administrative nature, primarily concerning the details of the procedures by which Campbell would be paid for his services. Campbell had long since left the public sector, had no prior connection with the Attorney General's office and, since his appointment was for this one case only, he could anticipate having no future connection with the Attorney General's office more substantial than that of any other attorney in private practice. After completing his investigation, Campbell reported his findings to the Judicial Discipline Commission and prepared to commence his prosecutorial responsibilities at the probable cause hearing scheduled by the Commission.

The sequence of events as set forth by the uncontradicted affidavits in the record illustrates the very type of separation of the investigatory and prosecutorial function from the adjudicatory and legal advisory functions recommended in the Report and Recommendation to the ABA House of Delegates on the proposed changes to the American Bar Association's Model Rules for Judicial Disciplinary Enforcement. The procedures followed by the Commission and its special counsel far exceeded the due process standards that have been set forth in both state and federal cases.

It should also be apparent that Campbell's participation in these writ proceedings against the Commission is not only reasonable but mandatory, considering that so many of petitioner's allegations of impropriety focus on Campbell's actions. The majority states that, "Although the Attorney General and the Commission have continued to assert that Special Deputy Attorney General Don Campbell was not and is not acting on behalf of, or in concert with, the Attorney General's office, we put that contention to rest in *Whitehead II*. . . ." In so stating, the majority implies that this court has already determined that Special Counsel Campbell is nothing more than an agent or attache of the Attorney General and that consequently, whatever responsibilities Campbell undertakes are responsibilities undertaken by the Attorney General. The majority mischaracterizes *Whitehead II*.

The majority in *Whitehead II* simply addressed respondent's contention that "the decision to employ and the selection of Special Counsel Donald J. Campbell was made *solely* by the Commission, *not* by the Attorney General." *Whitehead II*, 110 Nev. —— at ——, 873 P.2d at 953. The *Whitehead II* majority pointed out the various ways in which it believed that the Attorney General to have acted in concert with Campbell; however, it never addressed whether the Attorney General's office and Campbell performed the same functions in this case. In fact, the majority specifically stated that it would not "decide the extent to which the Attorney General and others under her direct control and supervision have also functioned in an investigatory and prosecutorial capacity." *Id.* at —— n. 2, 873 P.2d at 950 n. 2. The majority further stated, "We may have occasion to address this subject further at a later date in the course of of disposing of other pending motions." *Id.* at ——, 873 P.2d at 955.

Given these statements and the question presented and addressed in *Whitehead II*, it cannot be said that this court

"put to rest" any contention other than the claim that the decision to employ and select Campbell was not made solely by the Commission.[3] Considering the uncontradicted affidavits, it is difficult to determine how the majority reaches its conclusion that the Attorney General's office, as opposed to Special Counsel Campbell is investigating and prosecuting in this case. Unfortunately, it is also a conclusion forming the edifice upon which much of the majority's argument is built.

ATTORNEY MISCONDUCT

In his concurring opinion, Justice Springer also alleges that the Attorney General's office should be disqualified from continuing to represent the Judicial Discipline Commission because of misconduct. Specifically, he alleges that the Attorney General has displayed such animus and antipathy toward the petitioner "that she has rendered herself and her office unsuitable and incapacitated to serve as a prosecutorial advocate in the judicial discipline case involving Judge Whitehead" and her "running comments on this case display a continuous effort to influence public opinion against Judge Whitehead." These allegations are unsupported by any competent evidence in the record. Counsel for the Petitioner have made these allegations, but there are no affidavits or competent evidence on which this court can, consistent with due process, condemn and sanction an attorney. This is particularly inappropriate when the client Commission is also, in effect, being sanctioned.

Furthermore, Justice Springer quotes a very small portion of ARJD 8. He neglects to point out that ARJD also states:

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[3] I will accept this for the sake of argument even though I conclude that the record does not support it. The uncontradicted affidavits indicated that although the Attorney General's office assisted in finding an attorney and in implementing the procedural details of hiring, the Commission alone made the decision to hire Campbell.

> In any case in which the subject matter becomes public, through independent sources, or upon a finding of probable cause and filing of a formal statement of charges, the commission may issue statements as it deems appropriate in order to confirm the pendency of the investigation, to clarify the procedural aspects of the disciplinary proceedings, to explain the right of the respondent to a fair hearing without prejudgment, and to state that the respondent denies the allegations.

The documents in the file indicating public comments, although not authenticated or properly considered as evidence, may well conform to the part of Rule 8 quoted above. Certainly, any decision on whether Rule 8 was violated should be determined after presentation of proper evidence and an opportunity to controver the evidence. It should also be noted that any public comments alleged to have been made by the Attorney General were made after Petitioner had waived any right to confidentiality and after he and his attorneys had apparently made extensive comments to the media.

Justice Springer seems to hold it as self-evident that adverse public comment about Petitioner automatically equates with violations of the Petitioner's due process rights. It should be apparent that such a concept has never been the law. We would have very few criminal prosecutions if that were the case.

Justice Springer quotes *Collier v. Legakes* for the proposition that in exercising its discretion to disqualify a prosecutor the court "should consider all the facts and circumstances and determine whether the prosecutorial function could be carried out impartially. . . ." 98 Nev. 307, 309-10, 646 P.2d 1219, 1220 (1982). Justice Springer chooses to ignore the uncontradicted evidence that the Attorney General has not been acting as prosecutor. The uncontradicted evidence establishes that Special

Counsel Don Campbell has been performing the prosecutorial function. There is not one iota of evidence that Campbell could not carry out his functions impartially or that he has engaged in any misconduct.

I agree that some violations of the rules could amount to a denial of due process, but whether due process has been provided is inherently fact-bound and requires only "such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). Pre-hearing publicity can only be of constitutional dimension if it deprives the petitioner of his due process right to an unbiased decision-maker. Thus any public comments of the Attorney General would be relevant to any constitutional inquiry only if her remarks can be assumed to be of such great influence on members of the Judicial Discipline Commission so as to render the Commissioners incapable of deciding the case on the basis of the evidence at the contested hearings. Nothing in the record so suggests.

Aside from the lack of evidence that the Commission members are particularly impressionable individuals, none of the remarks even alleged to be made by the Attorney General discuss the factual allegations against the Petitioner, which would be the subject of the Commission's inquiry. The discussions relate to the proceedings before this court, not proceedings before the Commission to which ARJD 8 refers. The "presumption of honesty and integrity in those serving as adjudicators," simply cannot be rebutted on such an insubstantial basis. *See Withrow*, 421 U.S. at 47, 95 S.Ct. at 1464.

This proceeding has been extraordinary in a number of respects, not the least of which has been the incredibly hostile tone of the pleadings. Unfortunately, the majority of this court has adopted a similar hostility toward the Nevada Judicial Discipline Commission and its counsel. This is unjustified, considering that the case involves com-

plex legal issues, many of constitutional dimension and many of first impression. Many issues are ones over which competent and ethical attorneys and judges can legitimately disagree. Yet, this court has treated good faith disagreements with the opinions of the majority as not just ridiculous, but evilly motivated. Even attorneys whose legal reasoning is incorrect deserve to be treated with courtesy and respect, not sarcasm and vilification. We should encourage healthy, open debate on legal issues, not stifle it.

The Commission's attorneys have been especially attacked. I do not recall seeing a case in which actions of the litigant have all been attributed to the attorney without any evidence that such attribution is warranted. This seems totally unjustified in any case, but especially here where the affidavits of the individual members of the Commission refute the attribution. The members of the Judicial Discipline Commission, judges, attorneys, and non-attorneys alike—are caricatured as spineless sycophants at the tender mercies of tyrannical attorneys run amok. It is a tragedy that respected and respectable public servants who have generously given of their time, energy and abilities should be so denigrated.

The majority of this court has presumed that it has heard the conversations between the attorneys and their client, and have, in effect, accused the attorneys of:

1. Counseling "acts of resistance" (*Whitehead I*, 110 Nev. 128, 141, 869 P.2d 795, 803);

2. Making "extended effort to establish grounds for charges against petitioner Whitehead, and to find witnesses to support them. . . ." (*Whitehead I*, 110 Nev. at 147, 869 P.2d at 807);

3. Not reading "our *Goldman* opinion with adequate care." (*Whitehead I*, 110 Nev. at 148, 869 P.2d at 807);

4. Using a special prosecutor as an attache and special deputy attorney general "to help [her] pursue ends that [she] may have desired to see realized." (*Whitehead I*, 110 Nev. at 148, 869 P.2d at 807);

5. Not relying "on evidentiary data compiled by original complaints," but rather on "grievances he searched out himself." (*Whitehead I*, 110 Nev. at 148: n. 16, 869 P.2d at 808 n. 16);

6. Counseling the Commission members "to place themselves in jeopardy of sanctions for contempt." (*Whitehead I*, 110 Nev. at 149, 869 P.2d at 808);

7. Counseling the Commission to proceed "in direct violation of the current procedural rules or ARJD." (*Whitehead I*, 110 Nev. at 162, 869 P.2d at 816);

8. "Contumaciously" withholding documents. (*Whitehead II*, 110 Nev. ——, ——, 873 P.2d 946, 951 (1994));

9. Violating "constitutional principles and court rules." (*Whitehead II*, 110 Nev. at ——, 873 P.2d at 951);

10. Engaging in "exaggerated and hysterical rhetoric as merely a transparent attempt to attract media attention and inflame public passion." (*Whitehead II*, 110 Nev. at ——, 873 P.2d at 953);

11. Improperly undertaking commitments "in violation of the ARJD." (*Whitehead II*, 110 Nev. at ——, 873 P.2d at 957);

12. Demonstrating "inordinate and unexpected sensitivity. . . ." (*Whitehead II*, 110 Nev. at ——, 873 P.2d at 956);

13. Attempting "to mislead this court into believing that our intervention in this proceeding is premature. . . ." (*Whitehead II*, 110 Nev. at ——, 873 P.2d at 959);

14. "[P]ublicly attempting to arrogate to the Commission a preeminent right of judicial review. . . ." (*Whitehead II*, 110 Nev. at ——, 873 P.2d at 964);

15. "[T]ried to capitalize on contrived 'leaks' to the media (hopefully engineered by others) by basing efforts to disqualify justices upon inaccurate 'leaked' material." (*Whitehead II*, 110 Nev. at —— n. 33, 873 P.2d at 969 n. 33);

16. Having "not only engaged in conduct that is not in accord with the ARJD, but, as mentioned, have made false statements of fact and law to the tribunal, SCR 172, and have unlawfully obstructed Judge Whitehead's access to evidence, SCR 173." (*Whitehead II*, 110 Nev. at ——, n. 33, 873 P.2d at 969 n. 33);

17. Having "sought to influence this tribunal by false, abusive statements to the media and other means possibly prohibited by law, SCR 14. . . ." (*Whitehead II*, 110 Nev. at —— n. 33, 873 P.2d at 969 n. 33);

18. "[I]nciting a circus-like atmosphere. . . ." (*Whitehead II*, 110 Nev. at —— n. 33, 873 P.2d at 969 n. 33);

19. Making untrue "representations about the Commission's prior position" which were "manufactured for the purpose of persuading someone other than the Justices of this court." (*Whitehead II*, 110 Nev. at —— n. 23, 873 P.2d at 963 n. 23).

The majority of this court is willing to presume not only what Commission counsel has advised, but to ascribe unflattering motivations for their actions without one bit of evidence supporting these presumptions and ascriptions. On the contrary, in some cases there is uncontradicted evidence denying the presumptions. Furthermore, the majority has adopted a hostile and sarcastic tone and characterization regarding legal arguments which competent and honorable attorneys can legitimately espouse. Furthermore, we should bear in mind that the opinions of this court are the law of this state, not necessarily because they are legally sound, but because this court is the court of last resort in this state.

I believe this hostile atmosphere has infected the proceeding and the decision to disqualify present Commission counsel. There are other forums appropriate for the determination of whether counsel have behaved appropriately. These forums provide procedures which recognize the attorney's due process rights, and where sanctions must be based on evidence, not assumptions.

The rhetoric by all parties involved in this case, as well as by the media, leaves much to be desired, but it is totally unfair to single out the counsel for the Commission. Aside from my contention that it is legally wrong, it is also unfair to deprive the Commission of its experienced counsel in the middle of a proceeding. It continues and lengthens the paralysis of the constitutionally-created system of judicial discipline in this state. The citizens of this state deserve better.

Of course, the Commisison will be free to hire another prosecutor and another legal advisor, but considerable delay is inevitable. Furthermore, if a former prosecutor like Donald Campbell can take time away from his private law practice to make his investigatory and prosecutorial skills available to the public, then proceed to follow the rules of law, procedure and ethics to the best of his ability, only to be unceremoniously dismissed, surrounded

by insinuations by his state's highest court that he is a ruthless political hit man of a public official he had never met prior to this case, one can be certain that his successor will have to be a very brave individual indeed. Much the same could be said for the next legal advisor to the Commission.

APPOINTMENT OF MASTER

There is no dispute that a breach of a duty to maintain confidentiality can and should be sanctioned in an appropriate tribunal. I do not agree that this court should appoint a master to investigate the source of information reported in the media without serious consideration of the ramifications of such an investigation and without setting forth specific guidelines. This is a very sensitive area in which Supreme Court Rules regarding confidentiality are likely to come into conflict with First Amendment rights under the constitution of the United States and with provisions of the constitution and statutes of the State of Nevada. Justice Springer apparently believes that there are no legal concerns in such an investigation. He ignores the fact that the member of the media who was given the information is the one person (other than the perpetrator) who knows who provided it and that this person is protected from revealing his source by NRS 49.275. Justice Springer is further assuming (with no justification whatsoever) that the source is a member of Judicial Discipline Commission. Furthermore, recent events lead to the strong inference that the breach of confidentiality occurred within this court. This court should check its own personnel and procedures before casting aspersions on others.

CONCLUSION

I still protest the piecemeal handling of this case. All of the issues should be resolved in one opinion as soon as possible. The rights of the citizens of this state, as well as those of Petitioner, are at stake.

For the reasons discussed above, I would deny the motion to preclude further involvement of the Attorney General and I would defer decision on the appointment of a master.

APPENDIX D

[Filed Sept. 1, 1995]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 24598

IN RE PETITION FOR A WRIT OF PROHIBITION OR IN THE ALTERNATIVE FOR A WRIT OF MANDAMUS

THE HONORABLE JERRY CARR WHITEHEAD,
Petitioner,

vs.

NEVADA COMMISSION ON JUDICIAL DISCIPLINE,
Respondent.

ORDER APPOINTING SPECIAL MASTER

Explanatory Recitals. This order appointing a Special Master is entered pursuant to and in conformance with this court's formal opinion issued July 26, 1994, Whitehead v. Comm'n On Jud. Discipline, 110 Nev. ——, ——, 878 P.2d 913, 923 (1994), and to respond in spirit to the 1995 Legislature's Senate Concurrent Resolution No. 10.

On July 26, 1994, the *Whitehead* court ruled that a Special Master "be appointed by the court" and empowered by "specific order of this court to conduct such investigations as shall be necessary to determine the sources of the unlawful breaches of confidentiality that may have occurred in these proceedings and the extent to which they may have impacted on Petitioner's due process rights."

In the *Whitehead* court's opinion filed February 24, 1995 (Whitehead v. Comm'n On Jud. Discipline, Advance Opinion 11, 111 Nev. —— (1995)), the *Whitehead* court expressly retained jurisdiction "to carry forward and implement all determinations and rulings that we have made in the course of these proceedings or will make in the future." This appointment of the Special Master implements the earlier order of the court ordering the appointment of a Special Master and represents a continuance of the *Whitehead* court's jurisdiction to see all aspects of this proceeding through to finality.

On March 31, 1995, the Legislature adopted Senate Concurrent Resolution No. 10, in which the Legislature proclaimed that it is "imperative that the citizens of this state have trust in and respect for the administration of the judicial system in this state" and urged the court to "consider measures" which would "foster public confidence and trust in the court system." The court respectfully honors the substance and intent of the Legislature's resolution and accepts the reality underlying the resolution, namely, that public confidence, trust and respect for this court and for the "judicial system of this state" have been brought into question as a result of the manner in which this court's decision-making in the captioned case has been negatively portrayed in the public media. We fully understand the concerns expressed by our Legislature which indeed underscore the extent of the damage to the Nevada Supreme Court and the Nevada judiciary by sources as yet unexposed, and the need to expose and hold accountable said sources as the only effective means of restoring public respect for this court and the Nevada judicial branch of government.

In issuing four major opinions and several orders in the *Whitehead* original proceeding for extraordinary relief, this court essentially ruled that: (1) the petitioner had been prosecuted before the Discipline Commission in a manner that was in excess of the Commission's jurisdic-

tion; (2) it was necessary to interpret, for the first time, the Commission's procedural rules and constitutional prerogatives, which the court did; (3) the Commission must in the future abide by its rules; and (4) that the Commission could proceed in the lawful processing of the Whitehead matter pursuant to sworn complaints and in accordance with its rules and the demands of due process.

Despite the foregoing, this court has been the object of such massive and unrelenting criticism in the handling of this case as to do serious damage to the public's trust, confidence and respect for the court. Of equal or greater importance, the damage inflicted on this court by unnamed forces, has included a marked interference with the administration of justice in the above-captioned matter, a marked impact on the capacity of this court and the Discipline Commission to provide due process in said matter, and marked damage to the independence of the court system in general and the supreme court in particular.

Recognizing these facts and the most serious need for their resolution, and wishing to provide a meaningful response to Senate Concurrent Resolution 10, to "consider measures" designed, in accordance with the resolution, to "foster public confidence and trust in the court system," and to formulate a public information program which will, in part, utilize the report and recommendations of the Special Master, we issue this order of appointment in the hope that effective measures will eventuate that will help to avoid future *unwarranted* degradation and erosion of the independence of the court and of the judicial system as a whole.

Finally, we note that the Special Master's appointment is now more necessary than ever, because much of what has been orchestrated and perpetrated against this court and the judiciary in general is far more serious than the breaches of a lawful order of confidentiality; rather, it has amounted to clear and concerted efforts to interfere in the

proper and lawful administrtaion of justice. These powerful and covertly fueled attacks on the independence of the Nevada judiciary and the specific administration of justice cannot be tolerated.

APPOINTMENT OF SPECIAL MASTER

As stated above, the *Whitehead* court has previously ordered that a Special Master be appointed. In conformity with our previous order, and in response to the spirit of the Legislature's Concurrent Resolution No. 10, HERBERT F. AHLSWEDE is hereby appointed as a Special Master of the *Whitehead* court to act as an officer and agent of the court, in accordance with the statement of duties and powers set forth in this order. If, for any reason the said HERBERT F. AHLSWEDE is unable to continue with his duties as Special Master, the *Whitehead* court shall promptly appoint a successor to see that the work of the Special Master is brought to a timely and effective conclusion.

Duties and Powers of the Special Master: The duties of the Special Master of the *Whitehead* court shall include any and all inquiries into the causes for the loss of public confidence, trust and respect for the Supreme Court and for the judicial system which are related to the above-captioned matter and which are referred to in the recitals above. As noted previously, the Special Master shall provide special attention to the interference with the administration of justice and the breaches of confidentiality that have so seriously impacted the efforts of this court to honorably, promptly, and effectively process the above-captioned matter. The Special Master shall, after making all appropriate inquiry, file with the *Whitehead* court a written report and recommendation, concerning the results of his investigatory efforts. From time-to-time the Special Master shall also file interim reports with the panel assigned to the above-captioned matter, and may at any time seek direction from said panel. The Special

Master may also make recommendations as to what course the *Whitehead* court should take in the future to ensure continued public confidence in the Supreme Court and in the judicial system of this state.

The powers of the Special Master of the *Whitehead* panel of the Supreme Court shall, as an officer and agent of said panel, include, in addition to the general powers inherent in his appointment as a Special Master, the following:

1. To carry out on behalf of the panel all discovery proceedings that are provided for and authorized by the Nevada Rules of Civil Procedure and the rules of this court.

2. To administer oaths or cause oaths to be administered to all persons examined at depositions or otherwise by the Special Master.

3. To request and to have issued by the Clerk of the Supreme Court, such subpoenas and subpoenas *duces tecum* that the Special Master of the Whitehead panel of the Supreme Court shall deem necessary to carry out the duties herein assigned to him by the court.

4. To petition the *Whitehead* panel of the Supreme Court, to issue orders to show cause or other appropriate orders, whenever such orders are deemed necessary by the Special Master or the panel to carry out the purposes of this order.

5. To submit vouchers to the Chief Justice on a weekly basis for approval and payment. In this regard, it is understood that the Special Master shall be paid an hourly rate of $145, which is the same rate that Special Deputy Attorney General Donald J. Campbell received in his investigative and prosecutorial duties in the above-captioned matter. The Special Master is admonished that this panel must be mindful of costs and fees incurred in

this matter and enlists the support of the Special Master in maximizing his efforts at a minimum overall cost.

Judicial Immunity. It is further ordered that in all proceedings conducted by the Special Master, the Special Master shall enjoy judicial immunity as an agent and officer of the *Whitehead* panel of the Supreme Court.

/s/ Steffen, C.J.
STEFFEN

/s/ Springer, J.
SPRINGER

/s/ Zenoff, Sr. J.[1]
ZENOFF

/s/ Guy, D.J.[2]
GUY

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[1] The Honorable Thomas L. Steffen, then Vice-Chief Justice, assigned The Honorable David Zenoff, Senior Justice, to sit in the place of The Honorable Robert E. Rose, then Chief Justice. Nev. Const., art. 6, § 19; SCR 10.

[2] The Governor appointed The Honorable Addeliar D. Guy, Judge of the Eighth Judicial District Court, to sit in place of The Honorable Cliff Young, Justice, who recused himself. Nev. Const.,

Editorial addendum: Justice Shearing has consistently opposed the appointment of a master, and in her February 24, 1994, dissent stated that she "would rescind the order appointing a master." Justice Shearing was nevertheless invited to join in this order. She declined to do so.

cc: Frank Brusa, Chairman, Judicial Discipline Commission

Herbert F. Ahlswede
Ohlson & Springgate
Hamilton & Lynch
Gentile, Porter & Kelesis
Laura Wightman FitzSimmons
Peter Alpert
Gerald Stern
Leo Puccinelli
Geoffrey Giles
Guy A. Zoghby

APPENDIX E

SUPREME COURT OF NEVADA

In re Petition for a WRIT OF PROHIBITION or in the Alternative for a Writ of Mandamus

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No. 24598

THE HONORABLE JERRY CARR WHITEHEAD,
Petitioner,

v.

NEVADA COMMISSION ON JUDICIAL DISCIPLINE,
Respondent.

Dec. 15, 1995

In original proceeding, the Supreme Court held that two Supreme Court justices who had been disqualified from judicial disciplinary proceeding and justice who had dissented could not, by "administrative" order, nullify previous judgment of the Court appointing special master, or terminate existence of the constitutionally empaneled Court.

So ordered.

Springer, J., filed concurring opinion.

OPINION

PER CURIAM:

The following opinion and judgment of the court constitutes an unprecedented but necessary response to a certain document filed by the dissenting justices and two disqualified justices in one of the court's administrative files on September 15, 1995. The document in question pur-

ports to be an "order" declaring actions of this court to be "void," and otherwise overruling substantive rulings of the constitutionally-empaneled court sitting in this case. Because two of the justices who signed the mentioned order were disqualified to act in this case, because notice and due process were denied to both parties to this action, the Judicial Discipline Commission and Judge Whitehead, and because the mentioned justices are in a position of conflict of interest, the "order" appearing in the form of the mentioned administrative document must be declared null and of no force or effect.

On September 15, 1995, the dissenting justice, Justice Shearing, and the disqualified justices, Justices Young and Rose, signed and filed an "administrative" document that bears the title, "Order Granting Petition and Vacating Order Appointing Special Master [1]." The referenced document purports, unlawfully, to nullify and set aside a previous judgment of this court granting a motion filed by petitioner Whitehead. This court ruled in July, 1994, as follows:

> A special master shall hereafter be appointed by the court and shall be specially empowered by further and specific order of this court to conduct such innvestigations as shall be necessary to determine the sources of the unlawful breaches of confidentiality that have occurred in these proceedings and the extent to which they may have impacted Petitioner's due process rights.

The September 15, 1995 document purports to overrule the decision above-quoted, and, additionally, purports to "declare[] void the 'Order Appointing Special Master' entered in Docket No. 24598" (the above-captioned matter). Neither counsel for the Commission nor Judge Whitehead was given any notice or the due process right to be heard prior to the signing and administrative filing of the men-

[1] A copy of the subject order is atttached to this opinion.

tioned "order" which purports to countervene the "law of the case" in this matter and to declare vital aspects of the decisions of the *Whitehead* court to be void. In addition to the other infirmities inherent in the September 15 document, the signing justices are in a position of conflict of interest, which prevents them from acting to stop the investigation in progress at the time the September 15 document was filed. (*See* Master's Report attached and made a part hereof.)

In addition to filing the subject September 15 document, the two disqualified justices (Justices Young and Rose) have recently announced their intention to go beyond merely declaring the appointment of the special master void in this case. Justices Young, Rose and Shearing have recently announced their intention to sign, on December 15, 1995, another similar administrative "order", at another "administrative conference," in which the three justices propose to declare "that the authority and existence of the Whitehead panel be terminated formally to end the existence of a legal body whose time has come and gone."

In sum, then, the dissenting justices, Justice Shearing, and the two justices who were heretofore disqualified from sitting in this case, Justices Young and Rose, have, without any further authority for doing so, signed an "administrative" order that pretends to reverse and invalidate significant rulings of the *Whitehead* court. The same three justices have recently announced their intention to sign another similar "administrative order" which would purport to disband and terminate "the authority and existence" of the court as constituted in this case. The only basis presented by Justices Young, Rose and Shearing for their attempts to reverse the judgment of the court is their unsupported (and unsupporable) statement that this court's orders relative to the appointment of a master were in some unstated way, "done without legal au-

thority." The stated reason for trying to dissolve this panel of the court is that the existence of the panel should be terminated because its "time has come and gone."

There is no need to cite legal authority for the proposition that disqualified justices are not empowered to alter the formal adjudications made by the court in this case. It would be idle for anyone to argue that disqualified justices have the legal power or authority to countermand a duly-entered judgment of this court under the guise of some supposed right inherent in their being elected members of the court. It is equally obvious that if the "order" of September 15, 1995, signed by Justices Young, Shearing and Rose had any conceivable legal effect (as it clearly does not), such an order would be clearly violative of the parties' due process rights to notice and the opportunity to be heard. Seeing no need for further discussions of this matter, the court enters the following judgment:

1. The order signed by Justices Young, Shearing and Rose, filed on September 15, 1995, which declares certain judgments and orders of this court to be "void," is hereby adjudged to be a nullity and of no legal force or effect.

2. Any attempts by the dissenting Justice Shearing or by the disqualified Justices Young and Rose, by way of "administrative conference" or otherwise, to "terminate" the existence of the *Whitehead* court, as constitutionally empaneled in this case under Article 6, Section 4 of the Nevada Constitution, are clearly beyond the authority of the mentioned justices, individually or as a group of three, and such attempts must be and will be ignored by the court as it is presently legally and constitutionally empaneled.

3. The order of September 1, 1995, appointing Herbert Ahlswede as special master, remains in full force and effect as it was at the time of its filing.

STEFFEN, C.J., and SPRINGER, J., and ZENOFF, Sr. J.,[2] concur.

SPRINGER, Justice concurring:

I concur in the judgment of the court and point out that there are clearly a number of irrefutable legal reasons why two disqualified justices cannot be allowed to intervene in a case through the guise of an "administrative conference" and start cancelling out the decisions made in a case and controversy in which they were disqualified to sit. I will supply these legal reasons later, but at the outset I want to stress only the common sense aspects of this case, for I am confident that any reader of this opinion, lawyer or layperson, will understand, before I write another word, that a case duly decided by this court cannot properly be reversed or set aside by any combination of dissenting and disqualified justices who claim jurisdiction simply by changing their roles from judicial to administrative.

By way of simple illustration, consider a hypothetical case decided by a district judge who later discovers that his predecessor, who was expressly disqualified in the same case, had signed and filed in that case an "administrative order" declaring the judgment entered by the duly-appointed successor judge to be "void". It seems odd to contemplate any judge engaging in such untoward conduct, but the fact of the matter is that we are now faced with similar conduct being engaged in by three members of this court.

I think of a number of supreme court cases that have been decided by a panel of five jurists in which two of the panel members are district judges who have been consti-

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[2] The Honorable Thomas L. Steffen, Chief Justice, who was then Vice-Chief Justice, assigned the Honorable David Zenoff, Senior Justice, to sit in the place of the Honorable Robert E. Rose, Justice, who was then Chief Justice. Nev. Const., art. 6 § 19; SCR 10.

tutionally designated to "sit in the place" of disqualified justices. If these three justices were now permitted to set aide the judgments of this court merely by signing an in-chambers, "administrative" order, dissenters in any case could simply join with the disqualified justices in an "administrative conference" and overrule any case and controversy that was not to their liking. Thus, if the actions taken by the three justices in this matter are allowed to stand, any future decision of the court in which jurists were substituted for disqualified supreme court justices is in jeopardy. Such an action would disregard *stare decisis* and predictability in the law, and any case or controversy decided by a duly-constituted panel of this court would be subject to an overruling by a majority of three assembled in an "administrative conference" set at their pleasure. The rule of law would thus, in such cases, be supplanted by the preferences of disqualified jurists who, in the exercise of raw power could overrule decided cases at will.

In the above example of a district judge discovering that a previously-disqualified judge had filed an order superseding the lawful judgment of the court and declaring the court's judgment "void," there would at least be a remedy—the supreme court would, posthaste, cancel out such an attempt by a disqualified judge to reverse a legal decision of the court. There is, unfortunately, no one to appeal to when justices of the supreme court act in this way.

There is, of course, absolutely no legal basis for the action taken by Justices Young, Rose and Shearing. In addition to the invalidity of the subject order based on the disqualifications of Justices Young and Rose to sit in the Whitehead case, as noted previously, the "order" has denied notice and the opportunity to be heard to Petitioner Whitehead and the Commission. The fugitive "order" is also in violation of established court rules. Finally, and very importantly, at least one of the three justices is the subject of the Special Master's inquiry.

At this juncture, I think it is important for the reader to understand more fully the actions of this court which the three justices seek to declare "void." It should first be said that the decision of the *Whitehead* court that Justices Young, Rose and Shearing have attempted to declare "void" is the court's duly-entered order of February, 1995, which granted Judge Whitehead's motion to appoint a master. The motion was vigorously opposed and was the subject of oral argument to the court. The issue decided by the *Whitehead* court was whether inquiry should be made into the breaches of confidentiality that had been occurring in the *Whitehead* case. The issue was so serious that even the Nevada District Judge Association wrote an unsolicited letter to then chief justice Rose urging that he take measures to "investigate the source of these [confidentiality] violations of state law and to take whatever steps are necessary to put a stop to the practice."

Article 6, section 21(5) of the Nevada Constitution provides: "The supreme court shall make appropriate rules for: (a) The confidentiality of all proceedings before the commission, except a decision to censure, retire or remove a justice or judge." Following the stated constitutional mandate, this court adopted rules relating to confidentiality,which provide in ARJD 6 that any "person who breaches the confidentiality of judicial discipline proceedings is subject to being found guilty of contempt of the supreme court." Each member of this court has sworn an oath to "support, protect and defend the Constitution of the State of Nevada."

The Commission on Judicial Discipline commenced its activities in 1977. Approximately two years after it came into existence, the Commission began the practice of releasing confidential information relating to judges in a manner that was violative of the Constitution and Commission rules of procedure. These unlawful practices were discontinued in the 1980's but resumed in the 1990's,

accompanied by another unlawful practice, that of making secret agreements with judges and imposing secret punishments that were in violation of the constitutional provision quoted above.

I do not understand why the Commission has persisted in violating the Constitution by permitting confidential material to be released to favored press sources and by imposing secret punishments upon judges. Judges who have been the victims of these practices suggest that those responsible for these unlawful actions believed that they were enhancing their own power by currying favor with certain influential media sources and by holding over the heads of judges the threat of public disgrace if judges resisted too strongly the will of the Commission.

Before Judge Whitehead filed his challenge to illicit Commission practices, the members of this court were already aware of a number of constitutional violations being engaged in by the Commission. In one case, during confidential proceedings relating to a rural judge, the judge became the object of press accounts which alluded to supposed secret sources within the Commission itself. These planted news stories falsely attributed unfounded charges of sexual harassment and other sexual misconduct to a judge. Other comparable misuses of the system had been called to our attention by outraged judges; and, as a result of these revelations, some members of the supreme court became very much concerned about what the Commission was doing.

The constitutional violations that emerged in the *Whitehead* case (putting confidential Commission files into the hands of a friendly "investigative reporter") were merely the culmination of similar events in the past and inarguably the most brazen and destructive instances in the chain of constitutional violations. The Commission is the legally-designated custodian of these records, and escape of these records was becoming more the rule rather than the excep-

tion. It also became apparent that certain reporters, particularly certain members of the Capitol press corps, were more favored than others and that there was, perhaps, an organized scheme to avert constitutional confidentiality provisions entirely.

Judge Whitehead moved this court to appoint a master to investigate violations of his right to confidentiality and other claimed constitutional violations. Records in the *Whitehead* case revealed not only that confidential information was being unlawfully planted with favored media outlets, it also disclosed Commission practices in which judges were coerced into making secret "agreements" with the Commission that resulted in the imposition of punishments that were never made known to the public. Notable among these secret punishments was the practice of putting judges on "probation" to the attorney general's office, a practice which resulted in judges having to make rulings in cases where their "probation officer" from the attorney general's office was appearing before them as counsel.

The manner in which the Discipline Commission has been conducting its business presents a very serious threat to the independence of the Nevada judicial system; and it is primarily this concern that prompted this court to institute an inquiry into the practices described above. Contrary to the position taken by certain elements of the media that have been closely involved with the mentioned practices, the purpose of this court's appointing a master is neither to investigate the press nor to exact "vengeance" against anyone for embarrassing the court or its members. I cannot fault responsible members of the press for faithfully and accurately printing contraband material that was delivered to it by persons who were willing to violate the Constitution and laws of this state.

It was the concern of a majority of the *Whitehead* panel (as it should be for all members of this court) that the mentioned unlawful practices appeared to be carried out

in such a way as to degrade the courts, the judges and the Commission itself, and that judges at all levels of our court system were being denied due process of law. Moreover, the public was being denied the open processes of judicial discipline proceedings that the Commission's own rules expressly required.

Returning now to the issue at hand, and although it is certain that under no conditions could the three justices have assumed lawful jurisdiction to overrule any aspect of the *Whitehead* decisions, very little argument is required to show that the Judicial Discipline Commission and Judge Whitehead had to have received notice and the opportunity to be heard before the substantial rights of the parties could be altered.

I would not venture to say whether the Discipline Commisison would now be in favor of a continued investigation of the violations of law that took place in the *Whitehead* proceedings; but certainly the Commission should have been given notice and an opportunity to be heard before any action was taken by this court or by any individual justices.

The motion by Judge Whitehead to appoint a special master was granted by four of the five members of the *Whitehead* court. The judgment has long since been final and is not subject to challenge. The idea that Judge Whitehead could be lawfully deprived of his rights through some kind of ersatz, "administrative" machination involving two disqualified justices and a dissenting justice, is at total odds with any known conception of jurisdiction, fairness and due process.

There is a third reason, aside from the disqualification of Justices Young and Rose and the due process considerations discussed above, why the three justices should not be allowed to thwart the investigation commenced by Special Master Herbert Ahlswede. The reason is that evi-

dence gathered in the Master's preliminary investigation by the Special Master (before Justices Young, Rose and Shearing stopped him) points reliably to the possibility that at least one of the justices who signed the order may be involved in the breaches of confidentiality which are the subject matter of the investigation. In other words, it appears as though some of the justices may possibly be trying to put a stop to an investigation in which they themselves might be the targets.[1]

Although Justices Young, Rose and Shearing have signed an order purporting to put a stop to Mr. Ahlswede's investigational activities, Mr. Ahlswede did have time, before the justices were able to thwart the investigation, to gather some vital documentary evidence and take some witness statements. From the information provided by Mr. Ahlswede to the Chief Justice, it can now be said with confidence that the investigation was clearly on its way to the discovery of information that would be of exceptional interest to the judiciary and to the public. It is now established beyond question that the Special Master's investigation was anything but an unfounded "witch hunt," as it has been described by Justices Young and Rose. Among other significant discoveries by the Special Master, the identity of some of the persons responsible for the breaches of confidentiality have been discovered, and there is every promise of discovering all of the persons who engaged in what appears from presently available data to have been a deliberate conspiracy by a number of persons to violate the constitution and laws of this state.

Because the Special Master's investigation is not complete and could be impeded by a premature release of the identity of any of the persons being investigated by the

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[1] It is noteworthy that in her dissent in this case, Justice Shearing wrote that "*there is evidence* that some of the [unlawful] disclosures may have come . . . from the court itself." (Emphasis furnished.)

Special Master, I say no more about the investigation at this juncture. Suffice it to say for present purposes that two of the three justices who signed the September 1 order were themselves the subject of the investigation that these justices have ordered to be stopped. Even if these justices had had the authority to intervene in this case and the power to countermand the orders and decisions of this court, it would be a clear conflict of interest for them to order the cover-up and stoppage of an inquiry which tragically appears to involve one or more of the justices themselves.[2]

In conclusion, then, because: (1) Justices Young, Rose and Shearing have no jurisdiction to set aside the rulings of this case; (2) Justices Young and Rose are disqualified to act in any way that relates to this case; (3) the "order" declaring decisions of the *Whitehead* court in this matter void constitutes a clear denial of due process to the parties to this litigation; and (4) actual conflicts of interest prevent Justices Young, Rose and Shearing from acting in any way that would thwart the Special Master's investigation, I concur in the judgment of the court.

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[2] It should be noted that as independent grounds (in addition to the jurisdictional, disqualification, due process and conflict of interest reasons) for setting aside the subject order of September 15, 1995, Justice Rose (who was chief justice during the pendency of the Whitehead case) and Justice Young (who was and is Vice Chief Justice during the pendency of the Whitehead case) are precluded from taking any action that relates to the Whitehead matter by SCR 7(5) which provides: "In the event the Chief Justice or the Vice Chief Justice is either disqualified or wishes to recuse himself in regard to the decision *of any litigated matter, he is also precluded from undertaking any administrative action with regard thereto.*" (Emphasis added.)

Further, NRS 2.140 provides that the transaction of judicial business of the supreme court requires "the concurrence of three justices who heard the argument." Justices Young and Rose, disqualified from the Whitehead case, obviously are not justices "who heard the argument" in the Whitehead matter; therefore they are barred by NRS 2.140 from transacting any business relating to that case.

ORDER GRANTING PETITION AND VACATING ORDER APPOINTING SPECIAL MASTER

On September 7, 1995, the undersigned petitioned the elected justices of this court to review actions taken by a panel constituted to hear and decide the matter of Whitehead v. Nevada Commission on Judicial Discipline, Docket No. 24598. Our petition was prompted by the panel's issuance of an order, signed by only two of the elected justices of this court, appointing a special master/prosecutor, and directing the expenditure of public funds to facilitate the special master/prosecutor's activities. This order was entered by a majority of the panel constituted to hear and decide only the *Whitehead* matter. Because the order exceeds the panel's jurisdiction to decide the case before it and purports to authorize the expenditure of public funds, we are compelled to act in our administrative capacity to protect this court's resources and to govern the programs pursued by the court.

The administration of this court and the utilization of court resources must be authorized by at least three of the five elected Supreme Court Justices, i.e., a majority of this court. SCR 7(1); SCR 7(4). Any administrative action is null and void if a majority of the court disagrees with it. SCR 7(8). The *Whitehead* court issued its final decision in this matter on September 9, 1994. *See Whitehead v. Comm'n on Jud. Discipline,* 111 Nev. 70, 893 P.2d 866 n. 1 (1995). The "Order Appointing Special Master," was entered *one year* after entry of judgment in that matter "in the hope that effective measures will eventuate that will help to avoid future *unwarranted* degradation and erosion of the independence of the court and of the judicial system as a whole." (Emphasis in the original.) The undersigned, a majority of the duly elected Supreme Court Justices, determine that the appointment of a special master/prosecutor and concomitant expenditure of funds serves no legitimate purpose and amounts to a

gross waste of this court's limited resources. We therefore declare void the "Order Appointing Special Master" entered in Docket No. 24598, and hereby prohibit the payment of any cost or expenditure associated with the appointment of said special master/prosecutor.

It is so ORDERED.

MASTER'S INTERIM REPORT

Pursuant to an order entered by the above-entitled court September 1, 1995, appointing Herbert F. Ahlswede Special Master of the Whitehead court, and requiring him from time-to-time to file interim reports with the Whitehead panel concerning his investigation, the following report is hereby submitted:

1. My investigation discloses what appears to have been an intentional and knowing disclosure of confidential matters relating to the Whitehead matter before the Judicial Discipline Commission.

2. My investigation to date reveals that this disclosure may involve members of a law firm, at least two members of the supreme court and the attorney general's office. My investigation, to date, does not point to the involvement of any members of the Discipline Commission, but I do not foreclose the possibility of this being the case should my investigation be permitted to continue.

3. The evidence gathered to date discloses a flurry of communication among those aforementioned persons and those involved in the confidential breach at and around the time of the first "leak," October 10, 1993, when "unnamed sources" were reported to have revealed the confidential files relating to Judge Whitehead to an investigative reporter for a Las Vegas newspaper. The evidence, in the form of communications by FAX and telephone and telephone messages, reveals that possibly at least one member of the supreme court, presently unidentified members of the attorney general's office who were FAXing Whitehead materials to the law firm, members of the law firm, an investigative reporter for the Las Vegas newspaper, a reporter for a Reno newspaper, and an attorney who was representing the Discipline Commission, were involved in a conspiracy to unlawfully leak confidential information concerning the Whitehead investigation by the Discipline Commission.

4. My investigation discloses that evidence of the aforementioned communications, i.e. the telephone FAX records and telephone messages, were ordered destroyed at a time when it appeared that these records might be discoverable in any subsequent investigation into the source of the leaks. Notwithstanding the destruction order, those documents have been obtained. They appear related to the leak of confidential information.

5. I have also been made aware of a letter from a former member of the Attorney General's office indicating that the Attorney General told an assemblage of her deputies (including the author of the mentioned letter), in her Las Vegas Office, that "[Senior Justice] Zenoff's appointment [to the *Whitehead* panel] proved that 'the fix was in.' " I can think of no more serious charge than that of a "fixed" court. Certainly, if the statement was made by the Attorney General, and it had *any* substance, she had the absolute duty to prosecute any so-called "fixed" members of the supreme court. The making of such a statement by the Attorney General and her reasons for making such a statement should be fully explored.

Please keep in mind that this is only an interim report and not a final one. My investigation had just begun when Justices Young, Rose and Shearing ordered it terminated, before any conclusionary or final report could be submitted.

Because my investigation is not complete and because I still harbor some hope that I might be allowed to continue in the search for truth, I offer to the court the present, necessarily incomplete report, which has not included the names of those persons who may be involved.

My investigation cannot be considered any where near complete until I complete my intended work, which includes at minimum, the following:

1. Taking the deposition of certain clerical personnel and lawyers of the law firm involved.

2. Ascertaining who was faxing papers from the attorney general's office to the offices of the law firm involved.

3. Taking the deposition of *all* supreme court justices and some district court judges.

4. Examination of various involved law firm's records, including, at minimum, inspection of the computers used in the writing of documents and memoranda relating to the Whitehead case.

5. Examination of Supreme Court telephone and fax records.

6. A potential request for a federal inquiry into the influence that certain members of the law firm claim to have over a high federal prosecutorial official and of a mentioned FBI agent.

At the time Justices Young, Rose and Shearing signed the order purporting to terminate my authority, my next intended order of business was to interview all five of the supreme court justices. It was a matter of shock and outrage to me when I found that two of the justices who had signed the order were disqualified to act in the matter in which I had been employed.

Recently, the same three justices (two of whom have been legally disqualified to act in any manner in the White head case) have announced their intention to sign another three-justice order which would terminate entirely ongoing proceedings in a pending case. I realize that the three justices believe that the "time has come and gone" for the existence of the legally constituted panel in the Whitehead case. Nevertheless, it is beyond my understanding how this case can be extinguished by a stroke of the pen, particularly when it is the pen of jurists who are legally disqualified to act in this case.

I dread to think of the precedent that this action takes, for I assume, in the future, any time that three elected justices deem the manner in which a panel handling a case is unsatisfactory to them, they will try again to wipe it out of existence.

Respectfully submitted,

/s/ Herbert F. Ahlswede
HERBERT F. AHLSWEDE
Special Master

APPENDIX F

SUPREME COURT OF NEVADA

No. 27847

NEVADA ATTORNEY GENERAL, FRANKIE SUE DEL PAPA,
Petitioner,

v.

THE HONORABLE THOMAS L. STEFFEN, Chief Justice of the Nevada Supreme Court, THE HONORABLE CHARLES E. SPRINGER, Justice of the Nevada Supreme Court, THE HONORABLE DAVID ZENOFF, Senior Justice of the Nevada Supreme Court, in their official capacities and HERBERT J. AHLSWEDE, in his official capacity as Special Investigator,
Respondents.

April 25, 1996

Attorney General petitioned for writ of prohibition or, in the alternative, for writ of mandamus directing Supreme Court Chief Justice, Supreme Court Justices, and special master to cease all action in case and in particular all action in furtherance of allegedly unlawful and unconstitutional investigation directed at Attorney General and other individuals by special master. The Supreme Court held that: (1) Justices, by entering confidentiality orders in case and authorizing special master to investigate sources of breaches of those confidentiality orders, acted in excess of their jurisdiction; (2) violation of orders could not produce valid judgment of contempt; (3) even if orders

mandating confidentiality had provided valid basis for investigation, by initiating investigation, Justices improperly exercised functions of executive branch in violation of Constitution; and (4) by paying for investigation with personal funds, Justices violated due process of those accused by wrongdoing by special master.

Petition for writ of prohibition granted.

[1] PROHIBITION k10(1)
314k10(1)

Purpose of writ of prohibition is to restrain courts from acting without authority of law in cases where wrong, damage and injustice are likely to follow from such action.

[2] PROHIBITION k3(1)
314k3(1)

Writ of prohibition will only issue where no plain, speedy and adequate remedy exists at law.

[3] CONSTITUTIONAL LAW k90.1(3)
92k90.1(3)

Supreme Court Justices, by entering confidentiality orders in case and authorizing special master to investigate sources of breaches of those confidentiality orders, acted in excess of their jurisdiction; statute provides that court proceeding shall be public except as otherwise provided by law, constitution and administrative and procedural rules on judicial discipline (ARJD) provide no authority for confidential proceedings before Supreme Court itself, and concern with right to confidentiality and with possible harm to judiciary from publicizing of frivolous complaints against judges, though legitimate, did not constitute compelling state interest that would override constitutionally protected right of freedom of speech and press and access to courts in case of highest public concern. U.S.C.A. Const.Amend. 1; N.R.S. -.090.

[3] CONSTITUTIONAL LAW k328
92k328

Supreme Court Justices, by entering confidentiality orders in case and authorizing special master to investigate sources of breaches of those confidentiality orders, acted in excess of their jurisdiction; statute provides that court proceeding shall be public except as otherwise provided by law, constitution and administrative and procedural rules on judicial discipline (ARJD) provide no authority for confidential proceedings before Supreme Court itself, and concern with right to confidentiality and with possible harm to judiciary from publicizing of frivolous complaints against judges, though legitimate, did not constitute compelling state interest that would override constitutionally protected right of freedom of speech and press and access to courts in case of highest public concern. U.S.C.A. Const.Amend. 1; N.R.S. 1.090.

[3] RECORDS k32
326k32

Supreme Court Justices, by entering confidentiality orders in case and authorizing special master to investigate sources of breaches of those confidentiality orders, acted in excess of their jurisdiction; statute provides that court proceeding shall be public except as otherwise provided by law, constitution and administrative and procedural rules on judicial discipline (ARJD) provide no authority for confidential proceedings before Supreme Court itself, and concern with right to confidentiality and with possible harm to judiciary from publicizing of frivolous complaints against judges, though legitimate, did not constitute compelling state interest that would override constitutionally protected right of freedom of speech and press and access to courts in case of highest public concern. U.S.C.A. Const.Amend. 1; N.R.S. 1.090.

[4] CONSTITUTIONAL LAW k90.1(3)
92k90.1(3)

First Amendment guarantees public access to places traditionally open to public, such as criminal trials, U.S.C.A. Const.Amend. 1.

[4] CONSTITUTIONAL LAW k90.1(4)
92k90.1(4)

First Amendment guarantees public access to places traditionally open to public, such as criminal trials. U.S.C.A. Const.Amend. 1.

[5] CONSTITUTIONAL LAW k90.1(3)
92k90.1(3)

State may deny right of public access to trial only if it shows that trial is necessitated by compelling government interest, and is narrowly tailored to serve that interest. U.S.C.A. Const.Amend. 1.

[6] CONSTITUTIONAL LAW k90(1)
92k90(1)

Major purpose of First Amendment is to protect free discussion of government affairs. U.S.C.A. Const.Amend. 1.

[7] CONSTITUTIONAL LAW k90.1(3)
92k90.1(3)

Operations of courts and judicial conduct of judges are matters of utmost public concern, for First Amendment purposes. U.S.C.A. Const.Amend. 1.

[8] CONSTITUTIONAL LAW k328
92k328

Open court proceedings assure that proceedings are conducted fairly and discourage perjury, misconduct by participants, and biased decision making.

[9] CONSTITUTIONAL LAW k328
92k328

Openness of court proceedings promotes public understanding, confidence, and acceptance of judicial processes and results, while secrecy encourages misunderstanding, distrust, and disrespect for courts.

[10] CONTEMPT k21
93k21

Violation of Supreme Court orders issued in excess of jurisdiction could not produce valid judgment of contempt.

[11] CONSTITUTIONAL LAW k72
92k72

Even if Supreme Court orders mandating confidentiality had provided valid basis for investigation into source of leaked information and Supreme Court's lost prestige, by initiating investigation, Supreme Court justices improperly exercised function of executive branch in violation of constitution; investigation had nothing to do with power of judicial branch to hear and determine justiciable controversies, rather, power to initiate investigation into who engaged in potentially criminal behavior by leaking information to media in violation of court order of confidentiality was executive function. Const.Art. 3, s 1.

[12] CONSTITUTIONAL LAW k50
92k50

"Legislative power" is power of law-making representative bodies to frame and enact laws, and to amend and repeal them. Const. Art. 3, s.1.

See publication Words and Phrases for other judicial constructions and definitions.

[13] CONSTITUTIONAL LAW k76
92k76

"Executive power" extends to carrying out and enforcing laws enacted by legislature. Const. Art. 3, s 1.

See publication Words and Phrases for other judicial constructions and definitions.

[14] CONSTITUTIONAL LAW k67
92k67

"Judicial power" is authority to hear and determine justiciable controversies, including authority to enforce any valid judgment, decree or order. Const. Art. 3, s 1.

See publication Words and Phrases for other judicial constructions and definitions.

[15] REFERENCE k50
327k50

Special master, appointed to investigate sources of breaches of Supreme Court confidentiality orders, was not independent authority as generally contemplated by term master; master was under control of Supreme Court justices, master was authorized to seek direction from Supreme Court justices whenever warranted, and Supreme Court justices admitted that they personally paid fees incurred by special master after state funding was cut off.

[16] CONSTITUTIONAL LAW k268(8)
92k268(8)

By paying for investigation into sources of breaches of Supreme Court confidentiality orders, Supreme Court justices violated due process of those accussed of wrongdoing by special master investigating sources of breaches; justices who authorized and paid for investigation created situation which would offer possible temptation not to hold

balance nice, clear, and true between state and accused. U.S.C.A. Const.Amend. 14.

*246 Petition for a writ of prohibition or in the alternative for a writ of mandamus directing Respondents to cease all action in Supreme Court Case No. 24598 and in particular all action in furtherance of the allegedly unlawful and unconstitutional investigation directed at Petitioner and other individuals by Respondent Herbert F. Ahlswede, Special Master.

Frankie Sue Del Papa, Attorney General, Carson City, for Petitioner.

Chuck R. Gardner, Las Vegas, for Respondents.

OPINION

PER CURIAM:

Respondent Justices have appointed a "Special Master" to investigate alleged leaks of information to the press in violation of two early orders by a panel of this court directing *247 that the proceedings before this court in Case No. 24598, "the Whitehead case, "be kept confidential. We conclude that these orders mandating confidentiality were invalid and that Respondent Justices lack constitutional or legislative authority to appoint a special master to investigate the leaks of information to the media and the reason for this court's lost prestige. Accordingly, we grant Petitioner's petition for a writ of prohibition.

FACTS

This petition for an extraordinary writ emanates from that portion of the Whitehead case in which Respondent Justices appointed a special master to investigate the sources of information leaks to the press in violation of the Whitehead panel's orders of confidentiality entered July 22 and 30, 1993. On September 1, 1995, Respondent Justices filed an order appointing Respondent Herbert F. Ahlswede to investigate and expose the sources of the press leaks and to inquire into the loss of public confidence, trust, and respect for the Supreme Court and the

judicial system. Jerry Carr Whitehead v. Nevada Commission on Judicial Discipline, Docket No. 24598 (Order Appointing Special Master at 4, September 1, 1995). On September 15, 1995, this court entered an order which voided the order appointing the special master and prohibited payment of any costs or related expenditures; this court's order concluded that the Whitehead panel exceeded its jurisdiction by appointing the special master and that the expenditure of funds in relation to the investigation was a waste of court resources. Petition for an Order Rescinding Appointment of Special Master Entered September 1, 1995, and Voiding Associated Expenses, ADKT No. 221 (Order Granting Petition and Vacating Order Appointing Special Master at 1-2, September 15, 1995). On December 15, 1995, the Whitehead panel entered an opinion declaring that the order filed by this court on September 15, 1995 was a nullity and of no legal force or effect. Whitehead v. Comm'n on Jud. Discipline, 111 Nev. 1459, 1461, 908 P.2d 219, 220 (1995).

Petitioner argues that the September 15, 1995 order entered by this court is competing with the December 15, 1995 opinion entered by the Whitehead panel, thus creating a constitutional crisis which the Petitioner has been drawn into by virtue of her office. Petitioner seeks a writ of prohibition declaring that this court mandate that Respondent Justices cease all action in Case No. 24598, the Whitehead case, in particular all action in furtherance of the unlawful investigation conducted by Special Master Ahlswede.

We find it unnecessary to ask for a response or further authority from Respondents in regard to this petition because we are well aware of their position on the relevant issues as stated in their opinions in the Whitehead case and in the administrative petitions concerning that case.

DISCUSSION

The propriety of issuing a writ of prohibition or in the alternative a writ of mandamus in this action.

A writ of prohibition will issue where a tribunal has acted without or in excess of the jurisdiction of such tribunal. NRS 34.320; Goicoechea v. District Court, 96 Nev. 287, 289-90, 607 P.2d 1140, 1141 (1980). The purpose of a writ of prohibition is to restrain "courts from acting without authority of law in cases where wrong, damage and injustice are likely to follow from such action." Olsen Family Trust v. District Court, 110 Nev. 548, 552, 874 P.2d 778, 781 (1994). Furthermore, a writ of prohibition will only issue when no plain, speedy, and adequate remedy exists at law. Id.

We conclude that a petition for an extraordinary writ is proper in this case and that this court should entertain the petition. It appears that Respondent Justices, by entering the confidentiality orders and by authorizing the special master to investigate the sources of breaches of those confidentiality orders, have acted in excess of their jurisdiction. Additionally, this matter involves members of the highest court in this state, the writ is the only avenue of relief for Petitioner, and no other plain, speedy or adequate remedy exists at law. Finally, the ongoing investigation poses a threat to certain fundamental constitutional rights and guarantees, including freedom of speech, due *248 process, and separation of the branches of government, and therefore a recognized injury may result in the absence of a writ.

The confidential orders were entered without jurisdiction to do so.

Respondent Justices appointed a special master to investigate alleged leaks of information to the press in violation of two early orders by the Whitehead panel directing that the proceedings before this court in the Whitehead case be kept confidential. We conclude that these orders were invalid because Respondent Justices acted in excess of their jurisdiction when entering them.

Respondent Justices have invoked the Administrative and Procedural Rules for the Nevada Commission on Ju-

dicial Discipline (ARJD) as authority for the confidentiality orders. ARJD 5(1) provides: "All proceedings must be confidential until there has been a determination of probable cause and a filing of formal statement of charges." ARJD 5(2) provides that confidentiality "encompasses all proceedings of the commission and all information and materials, written, recorded or oral, received or developed by the commission in the course of its work and relating to alleged misconduct or disability of a judge." The Whitehead panel concluded that these rules also extended to judicial proceedings before this court after Judge Whitehead petitioned for extraordinary relief. The panel erred.

The scope of the ARJD is restricted to "the confidentiality of all proceedings before the Nevada commission on judicial discipline as imposed by § 21(5)(a) of article 6 of the constitution of Nevada, . . . and the conduct of investigations and hearings by the commission, as imposed by § 21(5)(c) of article 6 of the constitution of Nevada." ARJD 1 (emphases added). This restricted scope is required by the Nevada Constitution, which provides that this court shall make appropriate rules for "[t]he confidentiality of all proceedings before the commission, except a decision to censure, retire or remove a justice or judge." Nev. Const. art. 6, § 21(5)(a) (emphasis added). Overlooking the limiting language in this constitutional provision, Respondent Justices decided that the state public policy favoring confidentiality in initial judicial discipline proceedings is so strong that it prevails over any countervailing public policies to keep government open and the public informed, even when a judge avails himself of the traditionally public forum of this court and seeks to have all proceedings against him by the Commission on Judicial Discipline dismissed. This view disregards not only the right and need of the public to know of such an extraordinary dispute in governmental affairs but also the threat that secret judicial proceedings pose to public confidence in this court and the judiciary.

NRS 1.090 provides: "The sitting of every court of justice shall be public except as otherwise provided by law." The State Constitution and the ARJD provide no authority for confidential proceedings before the supreme court itself, and the Whitehead panel erred in concluding that it had such authority.

Furthermore, the confidentiality orders implicate First Amendment concerns. The First Amendment prohibits Congress from making any law "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. The Fourteenth Amendment makes this prohibition applicable to state actions as well. U.S. Const. amend. XIV, s 1. The First Amendment guarantees public access to places traditionally open to the public, such as criminal trials. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 577, 580, 100 S.Ct. 2814, 2827, 2829, 65 L.Ed.2d 973 (1980). In Richmond, the Supreme Court noted that though the right to attend civil trials was not at issue before it, "historically both civil and criminal trials have been presumptively open." Id. at 580 n. 17, 100 S.Ct. at 2829 n. 17. A state may deny this right of public access only if it shows that "the denial is necessitated by a compelling government interest, and is narrowly tailored to serve that interest." Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607, 102 S.Ct. 2613, 2620, 73 L.Ed.2d 248 (1982).

* 249 The Whitehead case did not involve a trial; nevertheless, at Judge Whitehead's behest, it became a judicial proceeding which implicated matters of great public concern. A major purpose of the First Amendment is to protect the free discussion of governmental affairs. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838, 98 S.Ct. 1535, 1541, 56 L.Ed.2d 1 (1978). "The operations of the courts and the judicial conduct of judges are matters of utmost public concern." Id. at

839, 98 S.Ct. at 1541. Furthermore, open court proceedings assure that proceedings are conducted fairly and discourage perjury, misconduct by participants, and biased decision making. Richmond, 448 U.S. at 569, 100 S.Ct. at 2823. Openness promotes public understanding, confidence, and acceptance of judicial processes and results, while secrecy encourages misunderstanding, distrust, and disrespect for the courts. Id. at 569-73, 100 S.Ct. at 2823-25. Despite their concerns with the potential for unfair actions by the Commission, Respondent Justices have never acknowledged the potential for abuse inherent in their attempt to proceed secretly in the Whitehead case. Despite their concerns with a loss of public confidence in this court, Respondent Justices have paid no regard to the distrust caused by their attempt to proceed secretly, by their intemperate reaction when that attempt was exposed, and by their obsessive preoccupation with avenging themselves against those who informed the press and the public of the case.

Respondent Justices' concern with Judge Whitehead's right to confidentiality and with possible harm to the judiciary from the publicizing of frivolous complaints against judges, though legitimate, does not constitute a compelling state interest that overrides the constitutionally protected rights of freedom of speech and press and access to the courts in a case of the highest public concern. The Whitehead panel thus issued its orders of confidentiality without authority and erroneously upheld their validity in later opinions.

Furthermore, Respondent Justices' efforts to identify and punish persons who provided information to the press are improper. Citing United States Supreme Court case law, the Whitehead panel stated that a court has authority to issue ancillary orders while considering other questions and to punish as criminal contempt violations of such orders even when it is later determined that the court lacked jurisdiction in the matter. Whitehead v. Comm'n on Jud.

Discipline, 110 Nev. 128, 136, 906 P.2d 230, 235 (1994). However, the panel overlooked contrary Nevada precedent holding that lack of subject matter jurisdiction renders a judgment void and that a person may not be held in contempt of a void order. State Indus. Ins. System v. Sleeper, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984). The Whitehead panel's disregard of this court's precedent and of the application of the doctrine of stare decisis without explanation or comment was improper.

Consistent with Sleeper, the Supreme Court of California has stated: In this state it is clearly the law that the violation of an order in excess of the jurisdiction of the issuing court cannot produce a valid judgment of contempt, and that the "jurisdiction" in question extends beyond mere subject matter or personal jurisdiction to that concept described by us in Abelleria v. District Court of Appeal [17 Cal.2d 280, 109 P.2d 942, 948 (1941)]: "Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction, [. . . .]" In re Berry, 68 Cal.2d 137, 65 Cal.Rptr. 273, 280, 436 P.2d 273, 280 (1968) (some citations omitted). Although the Whitehead panel had subject matter jurisdiction in the Whitehead case, it acted in excess of that jurisdiction under the First Amendment, NRS 1.090, and the ARJD in ordering that the proceedings in the Whitehead case before this court be kept confidential. Therefore, those orders were void, and their violation cannot produce a valid judgment of contempt.

Respondents' appointment of a special master was not authorized.

Even if the orders mandating confidentiality had provided a valid basis for an *250 investigation into the source of leaked information and this court's lost prestige, Respondent Justices lacked authority to initiate and oversee such an investigation.

On September 1, 1995, Respondent Justices entered an order appointing a special master whose duties included making "any and all inquiries into the causes for the loss of public confidence, trust and respect for the Supreme Court and for the judicial system which are related to the [Whitehead] matter." Jerry Carr Whitehead v. Nevada Commission on Judicial Discipline, Docket No. 24598 (Order Appointing Special Master at 4, September 1, 1995). More specifically, the special master was to "provide special attention to the interference with the administration of justice and the breaches of confidentiality that have so seriously impacted the efforts of this court to honorably, promptly, and effectively process the [Whitehead] matter," and to "conduct such investigations as shall be necessary to determine the sources of the unlawful breaches of confidentiality that may have occurred in [the Whitehead] proceedings and the extent to which they may have impacted on [Whitehead's] due process rights." Id. at 1, 4.

According to the September 1, 1995 order, the special master was to file the written results of this broad inquiry with the Whitehead panel and not to the five elected justices or the legislature. Id. Additionally, the special master was also required to file interim reports with the Whitehead panel and was permitted to seek direction from that panel at any time. Id. Furthermore, the powers of the special master were as broad as the scope of his investigation; the special master was declared an officer and agent of the Whitehead panel, was granted judicial immunity, and was given the power to administer oaths, to take depositions, and to issue subpoenas, subpoenas duces tecum, and orders to show cause. Id. at 5.

We conclude that Respondent Justices' order appointing the special master was improper for several reasons. Most importantly, Respondent Justices had no constitutional or other legislative authority to appoint a special master to investigate the causes for the loss of public confidence, trust and respect for the Supreme Court and

for the judicial system, and more specifically to expose the sources of news leaks to the media.

"The Constitution of the State of Nevada distributes governmental power into the Legislative, Executive, and Judicial departments; and each department is separate from the others." Galloway v. Truesdell, 83 Nev. 13, 19, 422 P.2d 237, 241 (1967) (citing Nev. Const. art. 3, s 1).[1]

The court in Galloway acknowledged the dangers of permitting one branch of government to usurp the power of another branch: " '[t]here can be no liberty . . . if the power of judging be not separated from the legislative and executive powers. . . . Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be the legislator: Were it joined to the executive power the judge might behave with all the violence of an oppressor.' " Id. at 19, 422 P.2d at 242 (quoting City of Enterprise v. State, 156 Or. 623, 69 P.2d 953, 957 (1937) (quoting Montesquieu).

This court has considered what constitutes legislative, executive, and judicial powers, and has concluded: [L]egislative power is the power of law-making representative bodies to frame and enact laws, and to amend and repeal them. . . . The executive power extends to the carrying out and enforcing the laws enacted by the legislature. . . . 'Judicial Power' . . . is the authority to hear and determine justiciable controversies. Judicial power includes the authority *251 to enforce any valid judgment, decree, or order. Id. at 20, 422 P.2d at 242.

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[1] Article 3, section 1 of the Nevada Constitution states: The powers of the Government of the State of Nevada shall be divided into three separate departments—the Legislative—the Executive and the Judicial; and no persons charged with the exercise of powers belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in cases herein expressly directed or permitted.

Based on these definitions, we conclude that the investigation to expose the sources of news leaks to the media had nothing to do with the power of the judicial branch to hear and determine justiciable controversies, and therefore respondents had no authority to initiate their investigation.[2] The power to initiate an investigation into who engaged in potentially criminal behavior by leaking information to the media in violation of the Whitehead panel's orders of confidentiality was an executive function reserved exclusively for the executive branch. By initiating the investigation, Respondent Justices improperly exercised the functions of the executive branch in violation of article 3, section 1, of the Nevada Constitution.

If Respondent Justices believed that someone had committed criminal contempt by leaking information regarding the Whitehead matter to the media in violation of that order, several investigatory bodies existed to which the matter could have been referred. If Respondent Justices believed that an attorney had disobeyed the court order, they could have referred the matter to the State Bar of Nevada, which is authorized to investigate complaints of misconduct and conduct disciplinary hearings on formal complaints of misconduct. SCR 104(7), 105. If Respondent Justices believed that a judge on this court had disobeyed the court order, they could have referred the matter to the Nevada Commission on Judicial Discipline, which

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[2] We note that the investigation at issue is in no way similar to the investigation conducted by Justice Steffen in conjunction with the behavior of district judge Paul Goldman. Goldman v. Nevada Comm'n on Judicial Discipline, 108 Nev. 251, 830 P.2d 107 (1992). In Goldman, Justice Steffen conducted a "tentative inquiry" into district judge Goldman's behavior on the belief that the behavior might constitute an emergency requiring an administrative reapportionment of the public's judicial business. Id. at 257, 830 P.2d at 11. However, Justice Steffen did not have authority to issue any subpoenas or show cause orders or to depose witnesses. Additionally, Justice Steffen's investigation was narrowly tailored to focus upon the behavior of one judge, as compared to the investigation at issue which was virtually boundless in scope.

is authorized to evaluate complaints relating to the fitness of a judge or justice. Nev. Const. art. 6, s 21. If Respondent Justices, because of the history of the Whitehead case, did not trust the Nevada Commission on Judicial Discipline to adequately investigate the complaint, they could have referred the matter to a district attorney's office or other law enforcement agency authorized to investigate alleged criminal activity, as they could have done if they believed that a private citizen not under the jurisdiction of the State Bar or the Judicial Discipline Commission had violated the orders. In any of these situations, Respondent Justices could also have asked a district attorney to seek an indictment from a grand jury. See generally NRS 172.145, 172.241.

Other relief was also available if Respondent Justices believed that a state employee had engaged in potentially criminal conduct if they believed that a state official had committed a "violation of trust," they could have petitioned a district court to impanel a grand jury to inquire into the matter. NRS 6.130(2). Similarly, Respondent Justices could have petitioned the governor to request that a district judge impanel a grand jury to investigate the conduct of state officials or employees or could have petitioned the legislature to pass a concurrent resolution ordering a district judge to do the same. NRS 6.135(1). Respondent Justices, however, chose none of these courses prior to launching their own unauthorized and illegal investigation.

Respondent Justices also argue that they were authorized to conduct such an investigation pursuant to Senate Concurrent Resolution No. 10, which reads in part: RESOLVED BY THE SENATE OF THE STATE OF NEVADA, THE ASSEMBLY CONCURRING, that the Nevada Legislature respectfully urges the Chief Justice and Associate Justices of the Supreme Court of Nevada to examine judicial accountability in this state and to consider measures which may enhance and allow greater pub-

lic access to the administration of the judicial branch and foster public confidence and trust in the court system in this state. *252 S.Con.Res. 10, 68th Leg., 1995 Nev.Stat. 2884-85.

When read in full, it is clear that the purpose of Senate Concurrent Resolution No. 10 was to promote the public's trust and respect for the judiciary by having the courts adopt measures of public accountability and, more specifically, by having the courts conduct their matters in public, not in secret, thereby providing the public with "access to information concerning the daily operation of each courtroom in this state and the professional activities of the judges who serve in them." Id. at 2884. The resolution did not contemplate or empower the initiation by a panel of this court of a far-reaching investigation into who leaked information to the media regarding the panel's secret proceedings. If anything, the resolution blamed secret proceedings for the public's loss of confidence in the judiciary.

Moreover, the appointment of the special master in this case was not in accord with procedures typically employed in the appointment of such an official. The appointment of the special prosecutor in the Watergate case provides an example of how an independent investigator is properly appointed. In that case, Archibald Cox was appointed as a special prosecutor by the United States Attorney General pursuant to a statute authorizing the Attorney General to do so. See Matter of Application for Appoint. of Ind. Counsel, 596 F.Supp. 1465, 1469 (E.D.N.Y. 1984) (concluding that, with regard to cases in which Watergate defendants had requested a federal district court to appoint a special prosecutor "there is no statute under our Federal System which authorizes this Court to appoint a special prosecutor. Such statutory authority as exists applies only to the authority of the Attorney General of the United States to appoint 'special attorneys' in the exercise of his discretion. 28 U.S.C. 515."), order vacated on other

grounds, 766 F.2d 70 (2d Cir. 1985). Additionally, the duties of the special prosecutor were specifically limited by the Attorney General, and extraordinary measures were taken by the United States Congress and the Attorney General to insure the independence of the special prosecutor. Congressional Quarterly Weekly Report, Vol. 31, No. 21, May 26, 1973, at 1313-14. Finally, the Special Prosecutor was paid with public funds and made his reports to the public, and not just to the Attorney General who appointed him. Id. at 1314.

Compared to the appointment of the Watergate Prosecutor and other special prosecutors and investigators, it is apparent that the investigation at issue, apart from being illegal and completely unauthorized as detailed above, suffered from other serious maladies. First, the scope of the investigation was too broad and the special master given too much authority. The order was not specifically limited and seemingly subjected anyone and anything to investigation as the special master saw fit. Additionally, the special master was purportedly given judicial immunity and the power to administer oaths, take depositions, and subpoena people and documents. The effect of this order was to confer massive powers upon the private investigator with no safeguards or measures for accountability. Such a situation placed both investigatory (i.e., executive) power and adjudicative power into the hands of a panel of this court, thereby presenting a situation which this court has previously disallowed because it permits the judge to " 'behave with all the violence of an oppressor.' " Galloway, 83 Nev. at 19, 422 P.2d at 242 (quoting City of Enterprise v. State, 156 Or. 623, 69 P.2d 953, 957 (1937)).

That Respondent Justices would even appoint a special master who acted under their control to coduct an investigation into the information leaks is surprising given the Whitehead panel's decision in Whitehead v. Comm'n on Jud. Discipline, 110 Nev. 874, 878 P.2d 913 (1994). In that case the panel removed the Attorney General from

the Whitehead matter largely because the Attorney General was acting as both a prosecutor in front of the Judicial Discipline Commission and as legal advisor to the Judicial Discipline Commission, an adjudicative body. Id at 885, 878 P.2d at 920. Therefore, the panel concluded that the Attorney General was unconstitutionally exercising the power of both the executive branch and the judicial branch. Id. at 880, 878 P.2d at 917. The panel also stated that the Attorney General had a conflict *253 of interest by acting in both capacities and stated that "[i]n our adversarial system, we have always been scrupulous about keeping adjudicative functions separate from the prosecutive functions, and fairness requires that we continue to do so." Id. at 885, 878 P.2d at 920. However, only a few pages later in that same opinion, the panel decreed that it was appointing a special master who would be under the panel's control and would investigate who leaked information to the media in violation of the panel's order of confidentiality. Id. at 890, 878 P.2d at 923. Such a situation invested both investigatory (i.e., executive) and adjudicative functions into the hands of a panel of this court, thereby creating the same unconstitutional exercise of power and the same conflict of interest which the panel had decried just pages earlier.

A second problem with the appointment of the special master was that the special master was not an independent authority as is generally contemplated by the term "master." The special master was under the control of the Whitehead panel, and the order authorized the special master to seek direction from the Whitehead panel whenever warranted. Additionally, Justices Steffen and Springer admitted that they personally paid the fees incurred by the special master after State funding was cut off. Nevada Attorney General, Frankie Sue Del Papa v. The Honorable Thomas L. Steffen, et al., Docket No. 27847 (Response to Petition for a Writ of Prohibition or in the Alternative for a Writ of Mandamus at 22, January 29,

1996). This fact obliterates any belief that the special master acted independently of the wishes or desires of the respondent members of the Whitehead panel.

The fact that the special master's fees were paid from the personal funds of Justices Steffen and Springer is a most disturbing aspect of the investigation. By initiating the investigation to seek out and punish those who leaked to the media information which casts them in a negative fashion, and by privately financing that investigation, it strongly appears that Justices Steffen and Springer hijacked the awesome power of this court to further their own personal vendettas and not, as they claimed, to discover why the public had lost confidence in the judiciary.

Furthermore, by paying for the investigation with personal funds, Respondent Justices apparently violated the due process of those accused of wrongdoing by the special master. In the case of In re Ross, 99 Nev. 1, 14, 656 P.2d 832, 840 (1983), this court determined that the Nevada Board of Governors, the body responsible for the finances of the bar association, acted as the fact finder in a quasi-judicial attorney discipline proceeding and that the significant costs of its investigation would be recoverable from the attorney only upon a finding of misconduct. Therefore, the court concluded that the Board of Governors had a financial interest in finding misconduct on the part of the attorney and that the discipline proceeding apparently violated the attorney's due process rights.

The same decision can be applied to the investigation authorized by the Whitehead panel. Here, Justices Steffen and Springer had a direct financial interest in the investigation as they were paying for it from their personal funds. Just as "[f]airness . . . requires an absence of actual bias in the trial of cases," In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed.2d (1955), fairness also requires an absence of actual bias in the investigation of cases. Because the Justices who authorized the investiga-

tion also paid for it, they created a situation" 'which would offer a possible temptation to the average man as judge . . . not to hold the balance nice, clear and true between the State and the accused.' " Id. (quoting Tumey v. Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749 (1927)). Such a situation amounts to a violation of due process and will not be permitted.

The payment of private funds for an allegedly public investigation effectively sidesteps the protection of NRS 353.260(2), which prohibits public officials from obligating a public body for expenses not expressly provided by law.[3] Respondent Justices did not seek or *254 receive legislative authorization to spend state money on their investigation. By launching the probe without fiscal authorization and then paying for a portion or all of the expense incurred, Respondent Justices clearly maneuvered around the prohibition of NRS 353.260(2) by paying the cost themselves and may have violated the law in the process. See NRS 353.260(4).[4]

Finally, the administration of the court system resides in the Chief Justice and the other four elected members of the supreme court. If this had been an investigation within the jurisdiction of this court to authorize, it would still have required three of the five elected justices to approve this administrative action. Again, such authority was lacking.

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[3] NRS 353.260(2) provides that "it is unlawful for any state officer, commissioner, head of any department or employee of this state to bind, or attempt to bind, the State of Nevada or any fund or department thereof in any amount in excess of the specific amount provided by law, or in any other manner than that provided by law, for any purpose whatever."

[4] NRS 353.260(4) provides: "Every officer of the State of Nevada, elective or appointive, who violates any of the provisions of this section shall be guilty of malfeasance in office."

CONCLUSION

The orders of the Whitehead panel mandating confidentiality in the Whitehead proceedings before this court were invalid and therefore unenforceable. Further, Respondent Justices lacked constitutional or legislative authority to appoint a special master to investigate the leaks of information to the press regarding the secret proceedings. Accordingly, we grant Petitioner's petition for a writ of prohibition, and we direct the clerk of this court to issue a writ of prohibition to the Respondents directing them to cease and desist from any further action in the investigation launched in Supreme Court Case No. 24598 by the appointment of a special master to determine the source of news leaks and the reason for this court's lost prestige.

APPENDIX G

[Filed Jul 05, 1996]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 24598

IN RE PETITION FOR A WRIT OF PROHIBITION OR IN THE ALTERNATIVE FOR A WRIT OF MANDAMUS

THE HONORABLE JERRY CARR WHITEHEAD,
Petitioner,

vs.

NEVADA COMMISSION ON JUDICIAL DISCIPLINE,
Respondent.

Original proceeding; opinion and judgment declaring void and illegal the opinion filed April 25, 1996 in Case No. 27847 purporting to grant attorney general's original writ petition in Case No. 27847, and dismissing the petition with prejudice.

SUPPLEMENTAL OPINION

PER CURIAM:

COURT'S SYLLABUS

1. *Statement of the Case.* The subject matter of this opinion is the continued effort by two justices of the supreme court, Justices Young and Rose, who are disqualified to act in this case, to thwart the judgments of this

court by clearly improper and unlawful means. The "court" in this case, a duly empaneled court made up of three supreme court justices and two jurists designated to take the place of the disqualified justices, Young and Rose, has entered lawful and unimpeachable judgments which relate (a) to preservation of Judge Whitehead's due process rights and (b) to the duty of the court not to condone violations of its orders and other contempts of court.

This opinion is occasioned by a second unlawful attempt by the disqualified justices, Young and Rose, to reenter this case and to issue bogus, collateral "orders" that purport to contradict or overrule the judgments of the supreme court entered in this case. Once before, the disqualified justices attempted to intrude themselves into this case and to overrule the court's judgments by signing an *ex parte* "administrative order," purporting to overrule the judgments of the court. The court declared this "administrative order" to be void (111 Nev. 1459, 908 P.2d 219). Now, they try again to interfere—this time by an *ex parte* "writ of prohibition" issued by the disqualified justices without notice to the parties in this case. Justices Young and Rose have now issued an order declaring that certain of the court's judgments in this case are "invalid and unenforceable" and that the duly-empaneled members of the court must "cease and desist from any further action." As with the void "administrative order," it is now necessary for the court to declare void this latest intrusion into the case by disqualified justices. This is the purpose of this opinion.

2. *The Rule of Necessity*. Although the latest attempt by Justices Young and Rose to reenter this case is void on its face, the court considers it necessary and prudent to make formal declaration of this circumstance, as it did with respect to the *ex parte* "administrative order."

NRS 2.140 provides that "[t]hree justices shall constitute a quorum for the transaction of business." Justices

Young and Rose have rendered it impossible for the court to have a quorum of three in this case by frustrating the constitutional process for replacing retiring or incapacitated justices.

There are two vacancies on the court in this case. District Judge Guy has retired. Senior Justice Zenoff declines to serve on the panel and has asked to be replaced. The chief justice, in accordance with long-established practice, has requested the governor to appoint replacements for the two absent justices, but the governor refuses to commission the requested replacements (Judge John P. Davis and Senior Judge Joseph O. McDaniel, who have agreed to sit on this panel). The governor bases his refusal to perform his constitutional duty to fill vacancies on this court on a rule recently adopted by Justices Young and Rose and the dissenting justice. The new rule prohibits the chief justice from filling vacancies absent the concurrence of a "majority of the elected justices." The present status of this case is that under the rule as written, it is impossible for the vacancies on the court in this case to be filled. The only two "elected justices" who seek the replacement of absent justices in this case are Chief Justice Steffen and Justice Springer. Not only do the remaining three "elected" justices refuse to request the governor to make the replacements, the two disqualified justices (Young and Rose) are not competent to participate in the replacement process.[1] Two vacancies remain indefinitely unfilled, and the court is therefore unable to

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[1] In the prohibition proceedings (Case No. 27847) that are the subject of this opinion, the disqualified justices and dissenting Justice Shearing did make a request of the governor that he appoint two district judges of their choosing, one of whom had been subpoenaed as a Commission witness against judge Whitehead. To their credit, both of the judges selected by the disqualified justices refused to accept commissions offered to them by the governor at the request of Justices Young, Rose and Shearing, and it became necessary for the three justices to sign the void prohibition order as an incomplete, three justice tribunal.

function as a court in the manner contemplated by the laws of this state. The resulting impasse has, as fully supported by authorities cited in this opinion, rendered it *necessary* for two justices, Justices Steffen and Springer, to issue this opinion so that the void writ of prohibition [2] now on file will not stand as the apparent law of this state.

3. *Present Status of Case.* This is the sixth formal opinion issued in this case. Past rulings of the court that are of most significance to the present opinion are:

a) A judge accused of judicial misconduct is entitled, under the Nevada Constitution and rules of the Discipline Commission (ARJD), to confidentiality at all times prior to a finding of probable cause. This includes proceedings for judicial review provided for by ARJD, Rule 40(7).

b) The disciplinary prosecution of Judge Whitehead was conducted in violation of Judge Whitehead's due process rights and in violation of the Nevada Constitution and Commission rules. The court did not order the Discipline Commission to stop proceedings against Judge Whitehead but, rather, to proceed against him only in accordance with the Constitution and Commission rules.

c) There were serious, repetitive contempts of the supreme court—some in the form of violations of court orders relating to Judge Whitehead's procedural rights and right to confidentiality, some in the form of direct refusals to obey the orders of the supreme court and some in the form of false defamatory public statements made against

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[2] We note that the writ which purports to overrule certain rulings of this case was filed by Justices Young and Rose under another case number, Case No. 27847. Although collateral in nature, the effect of the writ is clear, and that is to overrule aspects of the above-entitled case and to order that the members of the court "cease and desist" in all matters relating to this case. It is a case of Justices Young, Rose and Shearing issuing a writ of prohibition prohibiting the court itself from proceeding in this case. There is no legal or constitutional basis for such a writ. A writ of prohibition may be issued only by the supreme court against "inferior tribunals."

the court. The court decided that it was bound to hold those responsible for these contempts accountable for their actions. The court ruled that it was necessary to appoint a special master to uncover facts relating to repeated contempts of court and to make recommendations to the court relative to the contemptuous conduct. The court appointed a special master for this purpose.

4. *Conclusion.* The void, *ex parte* orders of Justices Young and Rose (both the "administrative" order and the prohibition order) purport to overrule vital judgments of this court. The disqualified justices have not challenged the court's judgments holding that Judge Whitehead's due process rights have been violated and that the Commission must proceed against Judge Whitehead in a proper manner. The disqualified justices have, however, "ruled" that this court's official, published judgments relating to a judge's right to confidentiality are "void." The disqualified justices have now re-issued orders purporting to thwart the court's investigation into the contempts of court.

Whether Judge Whitehead has been denied due process, whether judges are entitled to confidentiality until there has been a finding of probable cause and whether serious contempts of this court should be followed up or ignored are, of course, issues which have already been decided by this court and are the law of the case. Such are not, obviously, matters which are subject to interference by the *disqualified justices,* Young and Rose. The issue presented is whether Justices Young and Rose, who were disqualified from acting in this case, have the power, directly or indirectly, to overrule the judgments of the court in this case. They do not have such power; accordingly, all actions of Justices Young and Rose that affect in any way the judgments of the court in this case are declared to be void, and specifically, the opinion and writ issued under Case No. 27847 are declared void and of no legal force or effect.

I. *NECESSITY, BASES AND AUTHORITY FOR ISSUING THIS SUPPLEMENTAL OPINION*

This supplemental opinion, born of necessity, and entirely unique in nature, is reluctantly issued in an effort to preserve the rule of law and respect for law in the State of Nevada. The necessity for this two-justice supplemental opinion cannot be understood or respected without a full disclosure of the circumstances underlying its issuance.

The panel of this court that has had, and continues to have, lawful jurisdiction over Case No. 24598 (the *Whitehead* case) was, and is, in every respect *the Supreme Court of the State of Nevada* insofar as that case is concerned. The *Whitehead* court presently consists of a majority (three) of the elected members of the Nevada Supreme Court, Chief Justice Steffen, Justice Springer and Justice Shearing. Senior Justice Zenoff was appointed to sit on the *Whitehead* case in the place of then-chief Justice Rose by Justice Steffen pursuant to Art. 6, § 19 of the Nevada Constitution, and Supreme Court Rule 10. The other member of the *Whitehead* court during most of its tortured history and until ill health and retirement from judicial office forced his resignation from the court, was District Court Judge Addeliar Guy, who was appointed by the governor as requested by then-Chief Justice Rose pursuant to Art. 6, § 4 of the Nevada Constitution.

After Justice Shearing, Rose and Young issued an administrative order rescinding the appointment of a special master by the *Whitehead* court, and thereafter sought, by administrative order, to terminate the *Whitehead* panel, the *Whitehead* court was forced to issue its opinion in Whitehead v. Commission on Judicial Discipline, 111 Nev. 1459, 908 F.2d 219 (1995) (*Whitehead V*,) declaring the administrative order and intended termination of the *Whitehead* panel illegal and void. *Whitehead V* fully explains the actions of the three justices which forced the issuance of the latter opinion.

On December 20, 1995, Chief Justice Steffen submitted a letter to Governor Miller requesting that he appoint replacement judges for District Judge Addeliar Guy, who was retiring, and Sr. Justice Zenoff, who had family illnesses and had requested that he be replaced on the *Whitehead* panel. *See* Exhibit A.

On December 21, 1995, Attorney General Frankie Sue Del Papa filed an original writ petition with the Nevada Supreme Court naming *Whitehead* court justices Steffen, Springer and Zenoff as respondents, along with the special master appointed in the *Whitehead* case. The dissenting justice in the *Whiitehead* case was not named, nor, of course, were the two disqualified justices, Rose and Young. As elucidated in the body of this opinion, the purpose of the attorney general's writ petition in Case No. 27847 was to accomplish an overruling of certain final rulings in Case No. 24598 (the *Whitehead* case) through means of the dissenting Justice Shearing and the disqualified Justices Rose and Young.

After the attorney general filed her petition in Case No. 27847, and for a period of eight days, the governor, who has invariably and routinely issued commissions to substitute judges as requested by the chief justice with dispatch, had taken no action on Chief Justice Steffen's request for the two replacement judges on the *Whitehead* panel. We soon learned why after receiving a copy of a filed "Order" signed by Justices Shearing, Rose and Young purporting to require a majority of the elected members of this court to approve in writing any assignment of other judges to sit on any Supreme Court cases, including, specifically, the signing of any request to the governor for issuance of special commissions to any senior or retired district court judges to sit on our court. *See* Exhibit B. This "Order" was an obvious device for preventing the naming of additional judges to serve on the *Whitehead* panel.

Due to the continuing lack of response from the governor concerning the December 20, 1995 letter requesting

his appointment of the substitute jurists, Chief Justice Steffen again wrote the governor on January 10, 1996, asking that he honor the request of the former letter. *See* Exhibit C. Thereafter, on January 12, 1996, the governor responded by letter declining to appoint substitute judges without a request by a majority of the elected members of the court as specified in the "Order" issued by Justices Shearing, Rose and Young on December 28, 1995. *See* Exhibit D. The governor's letter of January 12 prompted a request for reconsideration to the governor dated January 16, 1996, signed by Chief Justice Steffen and Justice Springer. *See* Exhibit E. The governor again denied the request by letter dated January 29, 1996. *See* Exhibit F.

After disabling the *Whitehead* court, the dissenting Justice Shearing, and the two disqualified justices Rose and Young, then issued an opinion in Case No. 27847 purporting to declare certain final rulings of the *Whitehead* court in Case No. 24598 illegal and void. It also issued a writ of prohibition against the *Whitehead* panel of the Nevada Supreme Court purporting to prevent the *Whitehead* court from continuing with an investigation of serious contempts of this court by the special master.

At this point, the dissenting justice and the two disqualified justices, each of whom had incentives for attempting to overrule final decisions in the *Whitehead* case, must have concluded that they had achieved "checkmate." Indeed, if honor and respect for the rule of law and judicial ethics would allow, we simply would have permitted the three justices to bring this unfortunate matter to a dishonorable close in the hope that time might heal the gangrenous wounds to Nevada's judicial system.

Another complication surfaced in this tortured case when Senior Justice Zenoff, who is still a member of the *Whitehead* court, but who has, as noted above, asked to be relieved of further duty in the *Whitehead* case, declined to participate further in the case. We, of course, have no alternative other than to respect his position.

The distillate of the above recitals is that there are two functioning members of the *Whitehead* court remaining, the *Whitehead* case has not been finalized, and the dissenting justice, the two disqualified justices, and the governor have combined to prevent the appointment of substitute judges on the *Whitehead* court. Moreover, as discussed above, the attorney general, who was also strongly implicated as one of the subjects of the special master's investigation, has combined with the dissenting justice and two disqualified justices in Case No. 24598 in order to effectuate reversals of final rulings in *Whitehead* through what purports to be a separate writ proceeding in Case No. 27847. To the credit of our sister jurisdictions throughout this nation, we have been unable to find any historical parallel to what has occurred here in any other jurisdiction.

The above recitals will hopefully explain the necessity and bases for this Supplemental Opinion in Case No. 24598. We will now turn to the authority for issuing this opinion.

The Rule of Necessity

Given the unique circumstances of this case, it will be seen that the Rule of Necessity, generally applied to allow disqualified judges to hear, by necessity, the very cases in which they are disqualified, applies equally to this case by compelling analogy. In Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), Chief Justice Marshall wrote that a court

> must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. *We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which*

> *is not given.* The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them.

Id. at 404 (emphasis added). As observed by the United States Supreme Court in commenting on the quoted segment from *Cohens,* Chief Justice Marshall's exposition "could well have been the explanation of the Rule of Necessity." United States v. Will, 449 U.S. 200, 216 n.19 (1980).

In State ex rel. Brown v. Dietrick, 444 S.E.2d 47 (W. Va. 1994), the court expounded on the Rule of Necessity as follows:

> The rule of necessity is an exception to the disqualification of a judge. It allows a judge who is otherwise disqualified to handle the case to preside if there is no provision that allows another judge to hear the matter. This rule of necessity is summarized in 46 Am.Jur.2d *Judges* § 89 (1969):
>
> > The majority view is that the rule of disqualification must yield to the demands of necessity, and a judge or an officer exercising judicial functions may act in a proceeding wherein he is disqualified by interest, relationship, or the like, *if his jurisdiction is exclusive and there is no legal provision for calling in a substitute, so that his refusal to act would destroy the only tribunal in which relief could be had and thus prevent a determination of the proceeding.*

Id. at 55 (emphasis added). Continuing, the *Dietrick* court declared that:

> The rule of necessity is an exception to the general rule precluding a disqualified judge from hearing a matter. Therefore, it is strictly construed and applied only when there is no other person having jurisdiction to handle the matter that can be brought in

to hear it, as stated in 46 Am.Jur.2d *Judges* § 90 (1969):

> The application of the rule permitting a disqualified judge to act where no other judge is available can be justified only by strict and imperious necessity, since the rule is an exception to the greater rule of disqualification resting on sound public policy. Under the doctrine, a disqualified judge may sit *where no decision is possible if he does not sit, as in the case of an appellate court where there is no method provided by constitution or statute to have another person sit as judge of the court if a member is disqualified.*

Id. (emphasis added).

In the instant case, the Rule of Necessity has compelling application not because of the need to have disqualified judges sit in order to enable the court to fulfill its constitutional obligation to decide a case over which it has jurisdiction, but because the disqualified justices have successfully intervened to frustrate the constitutional provision for the appointment of judges necessary to maintain a full complement of the court. In short, the disqualified justices have improperly exercised raw political power in an attempt to render the *Whitehead* court impotent, and place the capacity of the court to act in an indefinite state of limbo. We therefore hearken back to the words of Chief Justice Marshall stating that "we have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." If we were to allow the jurisdiction of the *Whitehead* court to evaporate without bringing the case and controversy before it to a proper and just closure, we would be engaging in an act of treason to the Nevada Constitution foisted upon us by a combination fueled by the unlawful interference of the two disqualified

justices and the dissenting justice. Knowing that they have no ethical right to participate in determning who the successor judges should be in the *Whitehead* case, the two disqualified justices and the dissenting justice simply have manipulated the constitutional process for substituting and appointing judges into a presently effective veto power which they control.

By reason of a necessity artificially and improperly created entirely by the disqualified justices and the dissenting justice, it is clear that the underlying purpose for the Rule of Necessity virtually demands that this two-justice opinion be issued as at least a first step in recapturing the rightful capacity and authority of the *Whitehead* panel. Despite the attempts by the three justices to usurp the rightful jurisdiction of the *Whitehead* court through the issuance of an invalid opinion in Case No. 27847, the jurisdiction remains with the justices who lawfully sit on the *Whitehead* court. The responsibility thus continues with the lawful members of the *Whitehead* panel to see that the constitutional obligation to exercise their jurisdiction is not undermined or rendered impotent. A two-justice opinion has become an absolute necessity because the three justices have taken measures that have been thus far effective in erecting a barrier between the *Whitehead* court and the constitutional provision providing access to the governor for the appointment of substitute judges. The governor, having elected to recognize the irregular "Order" of the dissenting justice and the two disqualified justices, will apparently continue to cooperate with the three justices who are bent on preventing the *Whitehead* court from exercising its constitutional jurisdiction.

In summary, the actions of the dissenting justice and the two disqualified justices have created a compelling need for invoking the Rule of Necessity as lawful authority for the issuance of this two-justice Supplemental Opinion.

Inherent Powers of the Court

In State v. Superior Court, 5 P.2d 192 (Ariz. 1931), the Arizona Supreme Court cogently addressed the subject of the inherent powers of courts as follows:

> The difference between the *jurisdiction* of courts and their *inherent powers* is an important one. Jurisdiction in governments like ours is conferred by the provisions of the Constitution and statutes enacted in pursuance thereof. That, however, is not true with respect to the inherent powers. These inherent powers may be defined as such powers as are necessary to the ordinary and efficient exercise of jurisdiction. These powers do not depend upon constitutional grant or in any sense upon the legislative will, and are undefined and probably undefinable as to their exact extent. For instance, the power to maintain order; to secure the attendance of witnesses; to enforce process; the arrangement for a proper place and conveniences for the meeting of the court—all these powers must inhere in every court, or the purpose of its creation fails, and such being the case, they need not be given expressly by the Constitution or statute, and cannot be taken away by the latter. There is, however, one important and indeed vital limitation on these powers. They must be such as are necessary for the ordinary and efficient exercise of jurisdiction, and therefore *exist only when the jurisdiction to maintain which they are necessary is first established.*

Id. at 194-95 (citations omitted).

Ordinarily, NRS 2.140, a perfectly constitutional statute, would preclude the issuance of a two-justice opinion.[3]

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[3] NRS 2.140 provides:

> Three justices shall constitute a quorum for the transaction of business, excepting such business as may be done at chambers, and the concurrence of three justices who heard the argument shall be necessary to pronounce any judgment, except in chamber business; and if three justices who have heard the argument do not agree, the case shall be reargued.

However, given the circumstances now existing in the instant case, it is apparent that the referenced statute must give way to the inherent power of this court to take whatever measures are necessary to the "ordinary and efficient" exercise of its jurisdiction. As discussed above, the dissenting justice and the two disqualified justices have, with a cooperating governor, forestalled the exercise of constitutional jurisdiction of the Nevada Supreme Court sitting on the *Whitehead* case.

The constitutional jurisdiction of the *Whitehead* court is unchallenged, and derives from Art. 6, § 4 of the Nevada Constitution.[4] District Court Judge Jerry Carr Whitehead invoked the original jurisdiction of the Nevada Supreme Court by filing an original writ petition in this court pursuant to Rule 40(7) of the Administrative and Procedural Rules for the Nevada Commission on Judicial Discipline which provides that "[r]eview of interlocutory orders of the commission, which are considered either by the prosecuting officer or the respondent judge to be without or in excess of jurisdiction, may be sought by way of petition for an appropriate extraordinary writ." As detailed above, the supreme court properly accepted jurisdiction of respondent judge Whitehead's petition; and that jurisdiction remains the basis for the *Whitehead* panel's continuing obligation to finalize the case before it.

If the Nevada Supreme Court, *Whitehead* panel, were to abandon its constitutional obligation to exercise its jurisdiction to achieve final closure of the case and controversy before it, the court would deprive Nevada of its constitutional right to a functioning judicial branch of government. Moreover, we would equally deprive the litigants in the *Whitehead* case of the only forum having the jurisdiction to decide the controversy and provide the relief to

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[4] In pertinent part, Art. 6, § 4 provides that "[t]he [supreme] court shall also have power to issue writs of *mandamus, certiorari,* prohibition, *quo warranto,* and *habeas corpus* . . . ."

which the litigants are entitled. Therefore, in the instant case, the statute requiring the concurrence of three justices must yield to the inherent power of this court to preserve its capacity to continue the exercise of its constitutionally-based jurisdiction in the ongoing *Whitehead* case.

The need for invoking the inherent powers of the court exists only by reason of the actions of the three justices and a cooperating governor dedicated to the demise of the *Whitehead* court at any and all cost. It is with the greatest and most deliberate reluctance that we resort to this extreme measure in the face of this bizarre, and entirely unique situation. However, we appear to be left with no other honorable alternatives.

II. *PROCEDURAL BACKGROUND*

On December 21, 1995, Attorney General Frankie Sue Del Papa, petitioner in Case No. 27847, filed a petition in the Nevada Supreme Court seeking issuance of a writ of prohibition or in the alternative, a writ of mandamus, against three of the four remaining members of the constitutional panel of this court in Case No. 24598,[5] to wit: Chief Justice Thomas L. Steffen, Justice Charles E. Springer, and Senior Justice David Zenoff, as well as the Special Master (erroneously denominated Special Investigator) Herbert F. Ahlswede, duly appointed by the court in Case No. 24598. The petition sought to prohibit or

[5] Although the *Whitehead* court has issued a series of final opinions, throughout this opinion all such cases shall simply be referred to as "the *Whitehead* case, or "Case No. 24598." We note here, however, the cases previously filed by the *Whitehead* court: Whitehead v. Nevada Comm'n on Jud. Discipline, 110 Nev. 128, 869 P.2d 795 (1994) (*Whitehead I*); Whitehead v. Nevada Comm'n on Jud. Discipline, 110 Nev. 380, 873 P.2d 946 (1994) (*Whitehead II*); Whitehead v. Nevada Comm'n on Jud. Discipline, 110 Nev. 874, 878 P.2d 913 (1994) (*Whitehead III*); Whitehead v. Nevada Comm'n on Jud. Discipline, 111 Nev. 70, 893 P.2d 866 (1995) (*Whitehead IV*); Whitehead v. Nevada Comm'n on Jud. Discipline, 111 Nev. 1459, 908 P.2d 219 (1995) (*Whitehead V*).

mandate that the named respondents "cease all action in Supreme Court Case No. 24598 and in particular all action in furtherance of the unlawful and unconstitutional investigation directed against the Petitioner and numerous unnamed individuals identified by Respondent Herbert F. Ahlswede, Special Master of the 'Whitehead Court,' . . . appointed by Respondent Justices on September 1, 1995."

The attorney general, who was removed as counsel for the Nevada Commission on Judicial Discipline (the Commission) during the course of the proceedings in Case No. 24598, has sought to interfere with the jurisdiction, orders and judgments of the constitutional panel of this court in Case No. 24598 by means of the referenced petition in Case No. 27847.

Despite petitioner's assertion that "[t]his Petition does not place before the Court any substantive issue in Case No. 24598 . . . [and that] [i]ndeed all substantive issues in Case 24598 have long since been decided[,]" it will be seen that petitioner's entire thrust for relief is against rulings of the *Whitehead* court in Case No. 24598. Moreover, petitioner has beckoned for relief from two justices, Cliff Young and Robert Rose, who were expressly disqualified in Case No. 24598, and who, with the lone dissenting justice in the *Whitehead* case,[6] have concluded that they can assume control over the rulings of the *Whitehead* court and overrule them. Additionally, the three justices vainly attempted to name two additional judges to sit on Case No. 27847, in order to diffuse the effect of having two disqualified justices unlawfully sitting as a majority in granting the writ sought by the attorney general. The combination of the petitioner and the three justices has thus sought to interfere with and frustrate the lawful, constitutional jurisdiction of the *Whitehead* court,

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[6] Hereafter Justices Young, Shearing, and Rose, who have issued the opinion filed on April 25, 1996 in Case No. 27847, unless the text demands otherwise, will simply be referred to as "the three justices."

its rulings and judgments, and the fundamental respect for law which any tribunal must have in order to maintain public respect for the judicial branch of government. As far as we have been able to ascertain, the action of the three justices is without precedent in the annals of American jurisprudence.

In the course of its rulings, the *Whitehead* court determined that the Honorable Jerry Carr Whitehead,[7] petitioner in Case No. 24598, was entitled to confidentiality in this court in order to preserve the pre-probable cause confidentiality of the proceedings before the Commission as mandated by Article 6, § 21 of the Nevada Constitution. At least five of the six justices and judges who sat on the *Whitehead* court agreed that confidentiality was necessary in this court's resolution of Judge Whitehead's petition.[8] These justices included then-Chief Justice Robert Rose, prior to his disqualification, who now has joined in the decision purporting to overrule his own position in Case No. 24598. *See* Exhibit G. Moreover, the Nevada District Judges Association and the Board of Governors of the Nevada State Bar agreed that the pre-probable cause petition filed by Judge Whitehead had to be entertained by our court in confidence as mandated by the Nevada Constitution.[9] The mentioned organization of the district court judges also strongly urged then-Chief Justice Rose to see that measures were taken to determine the source

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[7] Judge Whitehead retired from the bench in January 1996 and is no longer a sitting judge.

[8] Justice Rose, Steffen and Springer, as evidenced by the three-justice order filed with the Clerk of the Court on July 30, 1993; and Justices Steffen, Springer, Sr. Justice Zenoff, and District Judge Guy as evidenced by their rulings in *Whitehead I*, *Whitehead II*, *Whitehead III*, *Whitehead IV*. Arguably, even the dissenting justice, Miriam Shearing, recognized the right of Petitioner to have his pre-probable cause writ petition in this court entertained in confidence. *See Whitehead IV*, 111 Nev. at 100 n.8, 893 P.2d at 884 n.8.

[9] *See Whitehead IV*, 111 Nev. at 100 n.8, 893 P.2d at 884 n.8.

of the unlawful breaches of the *Whitehead* court's orders of confidentiality. However, nothing was done.

On April 25, 1996, the three justices issued an opinion in Case No. 27847 purporting to grant the petition filed by the Attorney General, Frankie Sue Del Papa. The writ of prohibition issued by the three justices primarily declared that the *Whitehead* court's final determinations that the *Whitehead* petition had to be entertained before our court in confidence were "invalid and unenforceable," and that the special master was appointed by the *Whitehead* court without constitutional or legislative authority. It also purported to direct the respondents in Case No. 27847 to terminate their inquiry into contempts of this court and to "cease and desist from any further action in the investigation launched in Supreme Court Case No. 24598 by the appointment of a special master to determine the source of news leaks and the reason for this court's lost prestige."

In order to protect the constitutional jurisdiction and rulings of the *Whitehead* court, and to proceed with the lawful investigation by the special master into a series of contempts of this court which include serious violations of due process, the breaches of orders of confidentiality issued by the *Whitehead* court, and defamation of the court, it is necessary to issue this opinion declaring the opinion issued by the three justices on April 25, 1996, void and of no legal force or effect, and to dismiss Case No. 27847 with prejudice. It is also necessary to permanently enjoin the three justices from any further attempts to unlawfully interfere in any way with the decisions and orders of the *Whitehead* court.[10]

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[10] As noted previously, the three justices also attempted unsuccessfully, at public administrative conferences of the court held on September 15, 1995 and December 15, 1995 to rescind the appointment of the special master and to terminate the constitutional court in Case No. 24598. These maneuvers forced the *Whitehead* court to issue *Whitehead V* in order to declare the order by the three

III. *DISCUSSION*

A. *Why it is necessary to declare the opinion and writ issued in Case No. 27847 void and illegal?*

(1) *The petition and opinion and writ issued pursuant thereto constituted invalid attempts to require judges to recuse or disqualify themselves and thereby accomplish the reversal of the rulings of the Whitehead court.*

Petitioner Del Papa, by the extraordinary means of filing a petition against the duly-constituted majority of the *Whitehead* court, sought to force the disqualification of those justices in order to have the justices who were disqualified in the *Whitehead* case join with the lone dissenting justice in *Whitehead* to nullify critical rulings issued by the constitutionally constituted *Whitehead* court. We need only mention here that despite Del Papa's protestations to the contrary, the relief sought and purportedly obtained in Case No. 27847 applies strictly to the *Whitehead* case, that is, Case No. 24598. It is patently clear that Case No. 27847 was filed under a new docket number in an attempt to avoid such doctrines as law of the case, res judicata, and collateral estoppel, and the problem of having two disqualified justices in Case No. 24598 participate in interfering with and overruling critical aspects of the case in which they are disqualified. In every respect, however, Case No. 27847 represents an improper act of judicial manipulation calculated to oust the court of jurisdiction in Case No. 24598 in order to overrule judgments in that case that are not well received by the attorney general or the three justices.

In the first effort to infuse an appearance of legitimacy to their position, the three justices vainly sought to obtain two additional district court judges to sit with them on Case No. 27847 by representing to the governor that Jus-

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justices terminating the appointment of the special master, and their intention to terminate the *Whitehead* panel, illegal and void.

tices Steffen and Springer had disqualified themselves in the new case. After Justice Springer disabused the governor of that representation in writing, the three judges then simply, without any formal, adversarial proceeding, declared Justices Steffen and Springer, as named respondents in Case No. 27847, disqualified. Under normal circumstances, of course, their conclusion would be correct. But since they were attempting to oust Chief Justice Steffen and Justice Springer of their lawful jurisdiction in Case No. 24598 by means of a new case number, their attempt was without question unlawful and invalid.

We first observe that Petitioner Del Papa, an active participant in Case No. 24598 prior to her removal, named as respondents only those members of the *Whitehead* court who had ruled contrary to the strident positions which she took in that case. Not named, noticed, or allowed to participate, were Petitioner Jerry Carr Whitehead, the Discipline Commission and several *amici*. Former Judge Whitehead, of course, stands to lose the most from the actions of Del Papa and the three justices as he expended substantial legal resources in order to achieve at least a form of justice in the *Whitehead* case. Justice Shearing, the lone dissenter in the *Whitehead* case, was, of course, not named as a respondent.

The Arizona Supreme Court, in In re Ronwin, 680 P.2d 107 (Ariz.), *cert. denied*, 464 U.S. 977 (1983), observed, in agreement with a ruling by the Ninth Circuit, that:

> [T]he mere fact that a judge has been sued by reason of his rulings in a case does not require recusal. Nor can the fact that all judges in the court have been sued require recusal. To honor such a technique would be to put the weapon of disqualification in the hands of the most unscrupulous.

Id. at 117.

Other numerous cases, only certain of which we will cite here, have made it abundantly clear that Petitioner

Del Papa's attempt to oust the *Whitehead* majority of their jurisdiction in Case No. 24598 and supplant them with the three justices is unlawful. In Commonwealth v. Leventhal, 307 N.E.2d 839 (Mass. 1974), the court held that:

> [A] party cannot disqualify a judge to sit in this case by bringing an action against him after the principal suit is commenced. Nor is a judge disqualified because he is made a formal party as a method of seeking review of his rulings; to be disqualifying, the bias and prejudice must rise from an extrajudicial source and not from something learned from participation in the case.

Id. at 841 (citations omitted). Again, it has been held that "[a]dverse rulings against the defendant in the same or a prior judicial proceeding do not render the judge biased. In addition, a judge is not disqualified merely because a litigant sues or threatens suit." In re Hipp, Inc., 5 F.3d 109, 116 (5th Cir. 1993) (footnote omitted).

In United States v. Studley, 783 F.2d 934, 939 (9th Cir. 1986), the court held that "[t]he alleged prejudice must result from an extrajudicial source; a judge's prior adverse ruling is not sufficient cause for recusal." The court further held that "[a] judge is not disqualified by a litigant's suit or threatened suit against him or by a litigant's intemperate and scurrilous attacks." *Id.* at 940 (citation omitted); *see also* United States v. Grismore, 564 F.2d 929, 933 (10th Cir. 1977) ("A judge is not disqualified merely because a litigant sues or threatens to sue him"), *cert. denied*, 435 U.S. 954 (1978); Andersen v. Roszkowski, 681 F. Supp. 1284, 1289 (N.D. Ill. 1988) (where apparent that plaintiffs had no legitimate basis for suing the judge and did so because of judge's prior dismissal of plaintiff's complaint, there is no basis for disqualification, which would permit plaintiffs to "manipulate the identity of the decisionmaker and to engage in 'judge-shopping' "), *aff'd*, 894 F.2d 1338 (7th Cir. 1990).

In the case of Jones v. City of Buffalo, 867 F. Supp. 1155 (W.D.N.Y. 1994), the court stated:

> [I]t is apparent that Jones employs a litigation tactic by which he moves for disqualification or recusal of any judge who has or Jones believes will rule against him. . . .
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> . . . .
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> In my view, this tactic of suing federal judges and then seeking their disqualification is nothing more than a tactic to delay and fustrate the orderly administration of justice. Judges should not be held hostage to this kind of tactic and automatically recuse themselves simply because they or their fellow judges on the court are named defendants in a truly meritless lawsuit.

Id. at 1162-63 (quoting with approval Jones v. City of Buffalo, No. 89-1088 (W.D.N.Y. March 20, 1990) (order denying motion to recuse)).

The Supreme Court of Kansas, in response to an attempt to disqualify the members of that court in State v. Rome, 685 P.2d 290, 296 (Kan. 1984), held that "[w]e are charged [by Kansas law] with supervision of the practice of law. To permit the filing of a suit against members of this court to disqualify them from discharging that statutory duty would nullify it and permit manipulation of the court." Finally, then-Justice Rehnquist, in denying a motion to disqualify him for, inter alia, having made public statements concerning principles of law that were not favorable to the movants' position, stated that "[t]hose federal courts of appeals that have considered the matter have unanimously concluded that a federal judge has a duty to *sit* where *not disqualified* which is equally as strong as the duty to *not sit* where *disqualified*." Laird v. Tatum, 409 U.S. 824, 837 (Rehnquist, J. 1972) (citations omitted).

The distillate of both the law and facts involving the present attempt to disqualify the majority of the *Whitehead* court and to enter an opinion adverse to the rulings of the *Whitehead* panel, without its participation, is that the petition and action by the three justices are void as an unlawful attempt to manipulate the *Whitehead* court out of its rightful jurisdiction to act. Petitioner's remedy, while acting as counsel for the Commission, was to petition the *Whitehead* court for rehearing in an effort to cause the court to alter its position. As petitioner Del Papa stated in her writ petition, the issues raised by her under Case No. 27847 have long since been settled in a legitimate case and controversy. These issues cannot now be overruled through the means employed by the attorney general and the three justices.

> (2) *Justices who recused themselves in the Whitehead case may not now reverse their disqualification or recusal by ruling on the petition filed as Case No. 27847 and thereby overrule decisions of the case and controversy (Case No. 24598) in which they were disqualified to act.*

Every federal appellate court that has ruled on the problem of a recused judge attempting to reenter a case and participate in any form of adjudication or matter other than that of a strictly ministerial nature, such as transferring a case to another judge, has ruled any decision or order of such judge to be void. In the case of Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813, 827-28 (1986), the court stated that "we are aware of no case, and none has been called to our attention, permitting a court's decision to stand when a disqualified judge casts the deciding vote." Here, of course, we have two disqualified justices casting the deciding votes without even the slightest attempt to cite authority supporting their right to participate in an original petition calculated to overrule critical aspects of the very case in which they are both disqualified to sit.

In the case of Moody v. Simmons, 858 F.2d 137, 143 (3d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989), the court held that "[o]nce a judge has disqualified himself, he or she may enter no further orders in the case." Indeed, the *Moody* court even vacated an order that was not challenged by either party in the case. The Fourth Circuit, in Arnold v. Eastern Air Lines, Inc., 712 F.2d 899 (4th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984), held that:

> Patently a judge who is disqualified from acting must not be able to affect the determination of any cause from which he is barred.
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> . . . .
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> However, should he, or any other regular active member of the court, recuse or disqualify himself at any time, he is *out of service* insofar as that particular case is concerned. To disqualify means to debar legally. That is synonymous with lack of legal capacity, i.e., with inability to serve.

Id. at 904 (citation omitted) (footnote omitted). The *Arnold* court, with particular application to what has transpired with the two disqualified justices in the instant matter, also held that:

> [T]he logic is badly frayed inasmuch as it is assumed that a recused judge would vote on whether a case should be heard or reheard *en banc* even though disqualified from voting on the merits. The Fourth Circuit has simply not operated in that fashion, and we do not perceive how a disqualified judge could do so without infringing the rule that he should take no action which would possibly affect the outcome of a case. To count as a vote his non-vote might well be decisive as to whether the case would be reheard.

Id. at 905 (footnote omitted).

In an earlier effort to interfere with the course of Case No. 24598, the two disqualified justices, in alliance with

the dissenting justice, "adopted" a rule that purports to prevent the chief justice from requesting replacements on a given case from the governor without the prior approval of a majority of the elected members of the court. This was done in order to entice the governor not to appoint the requested replacements on the *Whitehead* court that were necessitated by the retirement of the district judge appointed by then-Chief Justice Rose, and the desired replacement of a senior justice whose family health difficulties caused him to seek relief from his assignment in the *Whitehead* case (and who now simply refuses to participate further in the *Whitehead* case). This represented but another unlawful and deliberate attempt to affect the court's rulings and capacity to rule in the *Whitehead* case.

Stringer v. United States, 233 F.2d 947, 948 (9th Cir. 1956), held that after disqualification, judges are confined to performing only the "mechanical duties of transferring the case to another judge or other essential ministerial duties short of adjudication." *See also* El Fenix de Puerto Rico v. The M/Y Johanny, 36 F.3d 136, 142 (1st Cir. 1994) (general rule that recused judge "should take *no further action* except to enable administrative reassignment of the case"; therefore, it was error for recused judge to set aside final judgment simultaneously with recusal order); *Moody*, 858 F.2d at 143-44 (if a judge adjudicates any issue after his recusal, that order is void); McCuin v. Texas Power & Light Co., 714 F.2d 1255, 1260-61 (5th Cir. 1983) (disqualification cannot be waived; disqualified chief judge prohibited from selecting judge who would handle case in which chief judge is disqualified because of statutory law and the creation of suspicion that chief judge would select successor whose views were consistent with his); Gubler v. Commission on Judicial Performance, 688 P.2d 551, 567-68 (Cal. 1984) ("Since petitioner was disqualified under [California law] from hearing the fee-setting issue, it was highly improper for him to give unsolicited advice to another judicial

officer on how to decide it"); Bolt v. Smith, 594 So.2d 864, 864 (Fla. Ct. App. 1992) ("Florida case law is well settled that once a trial judge has recused himself, further orders of the recused judge are void and have no effect"); State v. Evans, 371 S.E.2d 432, 433 (Ga. Ct. App. 1988) ("A disqualified judge can take no judicial action in the case and any attempt at such action is a mere nullity"); Ferguson v. Pony Express Courier Corp., 898 S.W.2d 128, 130 (Mo. Ct. App. 1995) ("It is true that a judge who disqualifies himself or who has been disqualified by one of the parties has no further right to hear the case"); State ex rel. Johnson v. Mehan, 731 S.W.2d 887, 888 (Mo. Ct. App. 1987) ("Once a change of judge has been entered and the case transferred to another judge the disqualified judge has no further authority in the case and any orders made after the disqualification are void"); Byrd v. Brown, 613 S.W.2d 695, 699-700 (Mo. Ct. App. 1981) ("Judge Moore's disqualification was effective upon the docket entry and the case was transferred to Judge Northern. Judge Moore had no further authority in the case. Therefore, the orders made after the initial docket entry of disqualification . . . were void") (footnotes omiteed); Pueblo of Laguna v. Cillesesen & Son, Inc., 682 P.2d 197, 199 (N.M. 1984) ("Since the district court was properly disqualified, it had power only to perform mere formal acts subsequent to the disqualification. After the affidavit of disqualification was filed, the judge had no jurisdication to act in matters involving the exercise of his discretion. Its subsequent consolidation order was therefore without legal effect") (citations omitted); State v. Nossman, 666 P.2d 1351, 1355 (Or. App. 1983) ("A judgment entered by a judge who has been disqualified in the manner prescribed in the statute is void"); and McElwee v. McElwee, 911 S.W.2d 182, 186 (Tex. Ct. App. 1995) ("If a judge is disqualified under the Texas Constitution, he is without jurisdiction to hear the case, and therefore, any judgment he renders is void and a nullity"). The authorities are uniform, in-

deed it is black letter law that a disqualified judge may not issue any orders or rulings other than of a "housekeeping" nature in a case in which he or she is disqualified. The two disqualified justices in the instant case cannot be allowed to avoid the effect of their disqualification and the law by simply suggesting that they are not sitting on or otherwise affecting Case No. 24598. Indeed, the entire thrust of their opinion and writ issued on April 25, 1996 is directed to the final decisions of the *Whitehead* case in which they are disqualified.

It was disingenuous to the extreme, in an order issued by the three justices on March 15, 1996 in Case No. 27847, to state that "[i]t is obvious that this case is not the same case as Whitehead v. Comm'n on Jud. Discipline, Docket No. 24598. Both the parties and the issues in the two cases are different." This blatant misrepresentation is readily refuted by simply comparing the two cases. The thrust of Case No. 27847 and the ruling of the three justices is that the orders of confidentiality and the appointment of the special master in the *Whitehead* case were invalid. These are the identical issues that were resolved by final judgment in the *Whitehead* case. Moreover, it is equally disingenuous to state that the parties are "different" simply because the attorney general filed a collateral writ petition naming the majority of the *Whitehead* court as respondents. If this type of jurisprudence were recognized by any court as valid, it would invite the same outrageous maneuvering that has occurred in the instant case, and finality could never be safely reached.

As we will later note, the two disqualified justices have displayed such disregard for the law and judicial norms that they have even gone to the length of issuing a writ that is absolutely unavailable as a remedy against the constitutional panel of the same court. The only court having the power to issue such a writ of prohibition is the United States Supreme Court.

(3) *The two disqualified justices are also disabled from acting in Case No. 24598 or Case No. 27847 because of the federal and Nevada requirements of due process.*

Nothing is more fundamental to our law than the right of all litigants to have a fair trial or hearing before a fair and impartial tribunal. No objective person could view the "court" issuing the opinion and writ in Case No. 27847 as either fair or impartial. First, all three justices "deciding" the petition in Case No. 27847 had previously attempted to rescind the appointment of the special master and terminate the *Whitehead* case in previous *administrative* conferences (virtually the same remedy sought by the petition in Case No. 27847). *See* Whitehead v. Nevada Comm'n on Jud. Discipline, 111 Nev. 1459, 908 P.2d 219 (1995). Second, two disqualified justices in Case No. 24598 have embraced the pretense that Case No. 27847 is different than Case No. 24598 in order to overrule major holdings of the case and controversy in which they are disqualified to act. Indeed, the "court" in Case No. 27847 purports to issue a writ of prohibiton *against the constitutional Nevada Supreme Court in Case No. 24598*, directing the court *in the latter case* to cease and desist from any further investigative action commenced through its lawfully appointed special master. Third, the disqualified justices are joined by the lone dissenter in Case No. 24598.[11] Fourth, it appears from what has thus far been produced by the special master's investigation and other factors that are observable and from which strong inferences may be drawn, that all three justices are possibly implicated in one aspect or another of the violation of law that occurred in Case No. 24598. Other possible participants in the

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[11] It is strongly arguable that Justice Shearing, having actively joined with the two disqualified justices in the attempt to usurp the jurisdiction of the *Whitehead* court, is herself no longer qualified to sit on the *Whitehead* case. However, we need not decide that issue at this time.

breaches of the *Whitehead* court's orders, and the denials of due process that most likely flowed therefrom, are the attorney general and one or more members of her staff or special deputies. It will be noted that we have thus far named all of the major actors in the production of the opinion and writ issued on April 25, 1966 under Case No. 27847. All appear to have major reasons for attempting to prevent the constitutionally empaneled *Whitehead* court from fulfilling its obligation to see that its lawful orders, as the Supreme Court of the State of Nevada, were properly obeyed and enforced. It is simply a major understatement to note that due process had no place in the opinion and order issuing from Case No. 27847.

Indeed, as previously noted, Judge Jerry Carr Whitehead still has every reason to expect that the rulings of the *Whitehead* court giving him the benefit of certain rights, including the granting of his motion for an investigation, will be carried out to an honorable conclusion without interference from those who are willing to use and abuse their powers to defeat the *Whitehead* court's jurisdiction. Judge Whitehead was not even noticed or given the opportunity to be heard in this latest attempt to do violence to the law and constitution of this state. Nor was the Commission given notice or the opportunity to be heard. Both are affected in one way or another by the opinion and writ issued in Case No. 27847.

One of the most basic requirements of due process is "[a] fair trial in a fair tribunal." In re Murchison, 349 U.S. 133, 136 (1955). This, of course, applies equally to hearings and appeals before appellate tribunals. Revisiting the seminal case on the subject, Aetna Life Insurance Co. v. Lavois, 475 U.S. 813 (1986), a member of the Alabama Supreme Court participated in a decision that announced a rule of law that was favorable to that justice's action in an otherwise unrelated suit. Indeed, the justice was the swing vote and the author of the opinion

that established law that would be beneficial to the justice in two unrelated actions against insurance companies. The United States Supreme Court vacated the judgment of the Supreme Court of Alabama, holding that Justice Embry's participation in the decision violated appellant's right to due process. In so ruling, the Court declared that it was unnecessary to determine whether Justice Embry was in fact influenced in his decision but only whether sitting on the case would present a " 'possible temptation to the average . . . judge to . . . lead him to not to hold the balance nice, clear and true.' " *Id.* at 825 (quoting Tumey v. Ohio, 273 U.S. 510, 532 (1927)).

The Supreme Court has also ruled that " 'justice must satisfy the appearance of justice.' " *Murchison*, 349 U.S. at 136 (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)). Moreover, the Due Process Clause may sometimes even disqualify judges who have no actual bias and " 'who would do their very best to weigh the scales of justice equally between contending parties.' " *Lavois*, 475 U.S. at 825 (quoting *Murchison*, 349 U.S. at 136); *see also* Del Vecchio v. Illinois Dep't of Corrections, 31 F.3d 1363, 1371 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 1404 (1995). Thus, "when a judge is faced with circumstances that present 'some [actual] incentive to find one way or the other' or 'a real possibility of bias' a court need not examine whether the judge actually was biased. Absent the incentive for bias, however, disqualification is not required despite bad appearance." *Del Vecchio*, 31 F.2d at 1372 (quoting Howell v. Jones, 516 F.2d 53, 57-58 (5th Cir. 1975)).[12]

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[12] We note with some reluctance that the disqualification of Justices Rose and Young in Case No. 24598 was not in any degree tenuous. The fact that Justice Rose was at least arguably in a position of jeopardy with the attorney general and the Discipline Commission over a secret meeting with the Clark County District Attorney (a personal friend) in which he was secretly recorded by the police as telling the district attorney that he would "love" to

It is painfully clear that the opinion and writ issued by the three justices on April 25, 1996 in Case No. 27847 was entertained and entered without due process of law. It is therefore void.

(4) *The three justices do not have the jurisdiction to enter prohibition against the same court on which they sit.*

The attorney general has sought writ relief that is not available to her in either Case No. 27847 or Case No. 24598, and the three justices were without jurisdiction to issue a writ of prohibition against a constitutional panel of the same court on which they sit.

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see the criminal charges pending against two friends, one a business associate, "go away," is public knowledge. This episode was the basis for the motion resulting in Justice Rose's disqualification.

Justice Young appeared with the members of the Discipline Commission (he served on that Commission during the pertinent periods of time in the course of the Whitehead investigation and litigation) when they finally delivered relevant records in the *Whitehead* matter to the court for its *in camera* inspection. More importantly, he sat with Commission members during the public adversary hearing before the court. Finally, on April 19, 1995, well into the *Whitehead* case rulings, Justice Young petitioned the court on its administrative docket (ADKT 202) on behalf of the Commission for an amendment to the Commission's rules to *still allow the imposition of discipline in secret, including the imposition of a fine of up to $5,000 and an agreement not to hold judicial office in the future, without any public filings, without any probable cause hearing, or means of determining whether the Commission was functioning responsibly in the imposition or lack of imposition of discipline.* Needless to say, Justice Young's position was in direct conflict with the ruling of the *Whitehead* court that the Nevada Constitution and the Commission rules required the Commission to either dismiss a complaint against a judge after a preliminary investigation, or schedule a probable cause hearing which, upon a finding of probable cause, required the Commission to employ a special prosecutor to prepare a formal statement of charges to be filed as a public document.

The *Whitehead* panel of this court was, and is, in every respect *the Supreme Court of the State of Nevada.* The *Whitehead* court presently consists of a majority (three) of the elected members of the Nevada Supreme Court, Chief Justice Steffen, Justice Springer and Justice Shearing. Senior Justice Zenoff was appointed to sit on the *Whitehead* case in the place of then-Chief Justice Rose by Justice Steffen in accordance with the Nevada Constitution, Art. 6, § 19 [13] and Supreme Court Rule 10.[14] Justice Zenoff has had all the judicial power and authority of a regularly elected member of this court while sitting on assignment with the court. *See infra* note 14. The other member of the *Whitehead* court during most of its history and until ill health and retirement from judicial office forced his resignation from the court, was Judge Addeliar Guy, Judge of the Eighth Judicial District Court, who was appointed by the governor as recommended by then-Chief Justice Rose pursuant to art. 6, § 4 of the Nevada Consti-

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[13] In pertinent part, art. 6, § 19 provides:

> 1. The chief justice is the administrative head of the court system. Subject to such rules as the supreme court may adopt, the chief justice may:
>
> . . . .
>
> (c) Recall to active service any retired justice or judge of the court system who consents to such recall and who has not been removed or retired for cause or defeated for retention in office, and may assign him to appropriate temporary duty within the court system.

[14] SCR 10, in pertinent part, provides:

> 2. A senior justice or judge, with his consent, is eligible for temporary assignment to any state court at or below the level of the court in which he was serving at the time of his retirement.
>
> . . . .
>
> 4. Each senior justice or judge assigned as provided in this rule has all the judicial powers and duties, while serving under the assignment, of a regularly elected and qualified justice or judge of the court to which he is assigned.

tution.[15] He also possessed all the judicial power and authority of a regularly elected member of this court while performing his assignment in the *Whitehead* case. *See supra* note 14. Indeed, Justices Steffen and Springer, Sr. Justice Zenoff and District Judge Addeliar Guy, along with the dissenting justice, Miriam Shearing, all participated in the final adjudications that the three justices now seek to nullify in Case No. 27847.

The California Supreme Court held that:

> A duly assigned judge pro tempore generally has the same power and authority (pro hac vice) as a regular judge of the court to which he or she is assigned. Logically, if one judge assigned to the Supreme Court to replace a disqualified Supreme Court justice has the power and authority of a Supreme Court justice in the assigned case, including the power to cast the decisive vote, it follows that four or more duly assigned judges have the authority to render a valid decision or judgment in a case before the Supreme Court.

Mosk v. Superior Court, 601 F.2d 1030, 1036 (Cal. 1979) (citations omitted). The exact same principle applies in Nevada only with greater force since the Nevada Constitution, art. 6 § 4, directly provides for the replacement of disqualified members of the supreme court. *See* note 15. In every respect, the court in Case No. 24598 was and is, the Nevada Supreme Court.

It is thus seen that we are faced with the prospect of two disqualified justices attempting to form a majority with

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[15] Art. 6, § 4 of the Nevada Constitution provides, in pertinent part:

> In case of the disability or disqualification, for any cause, of the chief justice or one of the associate justices of the supreme court, or any two of them, the governor is authorized and empowered to designate any district judge or judges to sit in the place or places of such disqualified or disabled justice or justices . . . .

the lone dissenting justice in the *Whitehead* case in order to overrule crucial final decisions in Case No. 24598 and to enjoin through prohibition issued in Case No. 27847 the exercise of jurisdiction by *the* constitutionally constituted Supreme Court of the State of Nevada. This they cannot do.[16]

The remedy of prohibition in the Nevada Supreme Court exists only with respect to actions by inferior tribunals which have acted in excess of their jurisdiction.[17]

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[16] The incredibly bizarre nature of the purported "remedy" extruded from Case No. 27847 is compounded by the fact that Case No. 27847 truly does create a "house divided" equally against itself since Case No. 24598 includes a panel of three elected members of the Nevada Supreme Court (Justices Steffen, Springer and Shearing), the same as in Case No. 27847 (Justices Young, Rose and Shearing). One is startled by the form of "ping-pong" jurisprudence the three justices seek to introduce in Nevada by the simple expedient of having disqualified justices join with a dissenting justice in a contrived writ proceeding designed to permit the collusive overruling of a case and controversy in which the disqualified members were enjoined from participating. The question will always arise: Which Siamese twin (panel of the court) will have the last say in determining what rule of law is to be respected?

We emphasize, however, that when disqualified justices who are regularly "elected" members of this court, join in an effort to affect or overrule the case and controversy in which they are disqualified, their status as "elected justices" has no efficacy in the formation of an "elected majority" purporting to have jurisdictional capacity to act in the matter in which they are disqualified.

[17] "The writ [of prohibition] may be issued only by the supreme court to an inferior tribunal" or specified others who are "exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal . . . ." NRS 34.330; NRS 34.320. In this historically bizarre proceeding, the three justices have sought to issue a writ of prohibition against the same court on which they are elected to sit. It will be seen from the text of this opinion concerning the composition and authority of the *Whitehead* court in Case No. 24598, that it is in no sense or effect an "inferior tribunal."

Moreover, it is clear that the reference to other entities who are "exercising judicial functions without or in excess" of their

It should surprise no one that the three justices made no attempt to justify the powers they have sought to exercise in Case No. 27847, since such powers do not exist. We can conceive of no greater source of the destruction and desecration of the judicial power than that which the two disqualified justices seek to assert by inviting and entertaining a writ that would enable them to overrule the holdings of the case and controversy in which they were disqualified to sit. Such a procedure makes a sham of an act of disqualification or recusal, and would eliminate the prospect of finality in the judicial process. Appeals and original proceedings lawfully entertained and acted upon by this court would no longer be imbued with the sound stabilizing protections of res judicata, collateral estoppel and law of the case. Rather than adhering to principles of appellate law that create finality upon final adjudication and denial of rehearing, final judgments of this court would be subject to the form of backdoor proceeding seen here, where disqualified justices could combine with one or more dissenting justices to overrule the finality established within the case and controversy in which they were unqualified to sit. Such a procedure would be intolerable to any court of last resort.

Since the remedy of prohibition (and mandamus) was unavailable to the attorney general, the three justices were powerless to act upon it. They were equally powerless, for reasons previously noted, to join forces with the lone dissenting justice in Case No. 24598 in order to overrule final adjudications in the matter in which they were and are disqualified.

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jurisdiction does not relate in any way to any constitutionally established court of record in Nevada. Indeed, a good example of the provision to which reference is made is to be found in the unauthorized, extra-jurisdictional activities of the Commission on Judicial Discipline as noted in great detail in the *Whitehead* opinions issued in Case No. 24598.

B. *Brief response to void order and writ issued by the three justices.*

It is unnecessary to comment on the three justices' void "rulings" concerning the issues finally decided in Case No. 24598. We do, however, consider it appropriate to respond to their vilifying views concerning the payment of the special master's fees by Chief Justice Steffen and Justice Springer.

The Order Appointing Special Master was filed on September 1, 1995. The order was issued pursuant to Whitehead v. Nevada Commission on Judicial Discipline, 110 Nev. 874, 890, 878 P.2d 913, 923 (1994), which opinion has long since been final. In the referenced ORDER, the special master, Herbert F. Ahlswede, was to receive compensation at the hourly rate of $145—the same rate of pay the attorney general contracted to pay the special deputy attorney general she employed for the purposes of investigating and prosecuting Judge Jerry Carr Whitehead. The Order of appointment was signed by Chief Justice Steffen, Justice Springer, Sr. Justice Zenoff, and District Judge Addeliar Guy, all of whom were empowered to issue said order in accordance with their jurisdiction as the Supreme Court in Case No. 24598.

On September 6, 1995, the three justices sent a memorandum to Don Mello, Director of the Administrative Office of the Courts, ordering him not to pay the special master unless and until approved by a majority of the court. As soon as Chief Justice Steffen received a copy of the referenced memorandum, he called Mr. Mello and told him that he would receive no vouchers for payment of the special master's services, as the chief justice did not want to place Director Mello in the middle of a controversy in which a majority of the elected members of the court could terminate his employment. It was clear, however, and had been so determined in advance of the special master's appointment, that funds existed within the

court's budget with which to appropriately pay the special master.

Neither Chief Justice Steffen nor Justice Springer was disposed to allow the further erosion of the honor of this court by denying the special master payment for services *already rendered*, and for which payment had been expressly authorized by lawful order of the court. The statement supplied by Special Master Ahlswede dated September 12, 1995, and paid by Justices Steffen and Springer, were for services *which the special master had performed in good faith on September 1 and 2, 1995, substantially in advance of the directive of September 6, 1995 by which the three justices sought to deny him payment.* The special master's statement totalled $1,450, and Chief Justice Steffen and Justice Springer each paid one half, or $725 each, in order to honor this court's obligation pursuant to the Order of appointment.

The special master performed his services in good faith and with maximum effect. Indeed, the product of his services is now of public record and remains an extremely fruitful foundation for the investigation that virtually cries out for completion in order to preserve the integrity and independence of the judicial branch of government in the State of Nevada. Instead, the very forces that are strongly implicated in the investigation are the same judicial and public officers that are using every artifice imaginable to prevent the investigation from continuing to an honorable conclusion.

Once again, the three justices have sought to convey the impression that the special master was being "privately financed" by Justices Steffen and Springer. This is false. As noted above, the payment to the special master for services already rendered was a matter of maintaining the honor and integrity of this court and its orders. To suggest, as the three justices do, that by "privately financing that investigation, it strongly appears that Justices Steffen and Springer hijacked the awesome power of this court to

further their own personal vendettas and not, as they claimed, to discover why the public had lost confidence in the judiciary," is repugnant to all sense of decency and truth.[18] We also note that the three justices again conveniently overlook the fact that the order committing the honor and good offices of the court to the payment of the special master's services was signed by *four* members of the court, not merely by Justices Steffen and Springer.

This court desires only to see that justice is served and that the investigation into criminal contempts of this court continues to its necessary and honorable conclusion. To suggest, as the three justices do, that the attorney general or the district attorneys over whom she has statutory supervisory powers could have conducted the investigation is highly disingenuous given the fact that the attorney general, rather than enforcing the confidentiality orders of the court in Case No. 24598, was at the forefront in opposing them and in attempting to frustrate any effort to determine the source of the violations of the confidentiality orders of this court. Her efforts continue to this day.

We continue to declare to all who will listen that the *Whitehead* court performed its constitutional duties with total honor and exactitude. We have no hesitancy in utilizing whatever honest and objective resources may be available in order to bring culpable parties to justice. We strongly believe that our citizens must not be deprived of the honest services of their public officers, judicial and otherwise, and the only way to secure that result is through a thorough, objective investigation. This court commenced with that objective and intends to continue with that objective to the extent that it may do so despite the

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[18] Significantly, the special master and veteran investigator was so convinced by the quality of the evidence he had produced of major corruption directed at this court, that he indicated in a televised interview that he would be willing to continue the investigation on a pro bono basis.

deliberate interference by powers who desire to maintain their lofty positions of public trust unjeopardized by what an honest investigation may reveal.

IV. *CONCLUSION*

For the reasons discussed above, we conclude that the opinion and writ of prohibition issued by the three judges on April 25, 1996 in Case No. 27847 are void and of no legal force or effect whatsoever, and we hereby permanently enjoin the two disqualified justices from any further attempts to participate in any form of action or effort to interfere, in any way, with the jurisdiction of the court in Case No. 24598 and its efforts to investigate and appropriately hold accountable, those responsible for the violations of its orders and any deprivation of the right to due process of the litigants in Case No. 24598.

/s/ Steffen, C.J.
STEFFEN

/s/ Springer, J.
SPRINGER

EXHIBIT A

SUPREME COURT OF NEVADA
Thomas L. Steffen, Chief Justice
Capitol Complex
Carson City, Nevada 89710

[SEAL]

December 20, 1995

The Honorable Robert Miller
Governor
Capitol Building
Carson City, NV 89710

Dear Governor Miller:

As you know, District Judge Addeliar Guy will be retiring soon, and has thus asked to be relieved of further participation in case number 24598 (the *Whitehead* case). In addition, Sr. Justice Zenoff, who has a terminally ill brother and a son who recently underwent major transplant surgery, has asked that he also be relieved of the stressful demands of this difficult case. We are very grateful to these two jurists for their devoted service under the most difficult of conditions.

Although I am most anxious to bring this unprecedented case to a close, unfortunately, the work of the *Whitehead* court is not complete. As you probably know, four of the five members of the panel determined, in *Whitehead v. Comm'n on Jud. Discipline*, 110 Nev. 874, 890, 878 P.2d 913, 923 (1994), that:

> A special master shall hereafter be appointed by the court and shall be specially empowered by further and specific order of this court to conduct such investigations as shall be necessary to determine the sources of the unlawful breaches of confidentiality that have occurred in these proceedings and the extent to which they may have impacted Petitioner's due process rights.

Since the *Whitehead* matter is not yet concluded, I respectfully request that you appoint District Judge John P. Davis of the Fifth Judicial District Court to sit in the place and stead of District Judge Addeliar Guy, and Sr. District Judge Joseph O. McDaniel to sit in the place and stead of Sr. Justice David Zenoff in Case No. 24598. If you find it in order, will you kindly issue an executive order to Judge John P. Davis and to Sr. District Judge Joseph O. McDaniel.

Thank you, and warm regards.

Very truly yours,

/s/ Thomas L. Steffen
THOMAS L. STEFFEN
Chief Justice

TLS/lr

EXHIBIT B

[Filed Dec. 8, 7995]

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE RECALL TO ACTIVE OR TEMPORARY SERVICE OF ANY RETIRED JUSTICE OR DISTRICT JUDGE, AND OF THE TEMPORARY ASSIGNMENT TO THE SUPREME COURT OF ANY JUSTICE OR JUDGE PRO TEMPORE OR SENIOR JUSTICE OR JUDGE

ORDER

WHEREAS, Article 6 Section 19 of the Constitution of the State of Nevada recites that the Chief Justice may, subject to such rules as the Supreme Court may adopt, recall to active service any retired justice or judge of the Nevada Court System; and

WHEREAS, Supreme Court Rule 10 delineates the procedure for the recall by the Supreme Court of retired supreme court justices or district judges to active service as senior justices and judges, and the procedure for the temporary assignment of senior justices and judges to service on the Supreme Court; and

WHEREAS, Supreme Court Rule 11 delineates the procedure for the recall by the Supreme Court of retired supreme court justices or district judges to temporary service as justices and judges pro tempore, and the procedure for the temporary assignment of justices and judges pro tempore to service on the Supreme Court; and

WHEREAS, Supreme Court Rule 7 authorizes the Chief Justice, as the administrative head of the Nevada Court System, and the Vice-Chief Justice when acting as Chief Justice, to perform administrative activities not inconsistent with the Court rules, or any decision or order of the majority of the Supreme Court; and

WHEREAS, it appears to a majority of the Supreme Court that the proper and orderly administration of the

Nevada Court System requires that the Chief Justice should recall to active or temporary service retired justices and district judges only with the approval of a majority of the Supreme Court; now therefore

IT IS HEREBY ORDERED that no retired supreme court justice or district judge may be recalled either to active service as a senior justice or judge, or to temporary service as a justice or judge pro tempore, without written approval of a majority of the elected members of the Supreme Court;

IT IS HEREBY FURTHER ORDERED that no senior justice or district judge, or justice or judge pro tempore may be assigned to temporary service on the Supreme Court without written approval of a majority of the elected members of the Supreme Court.

IT IS HEREBY FURTHER ORDERED that any request to the Governor of the State of Nevada for issuance of a special commission to a senior district judge or retired district judge assigned to hear and determine any case in the Supreme Court shall be signed by a majority of the elected members of the Supreme Court.

IT IS HEREBY FURTHER ORDERED that any action taken in contravention of this order shall be null and void.

DATED: December 28, 1995.

/s/ Young, V. C. J.
YOUNG

/s/ Shearing, J.
SHEARING

/s/ Rose, J.
ROSE

cc: Hon. Robert J. Miller, Governor
Hon. Thomas L. Steffen, Chief Justice
Hon. Charles E. Springer, Justice

EXHIBIT C

January 10, 1996

Hon. Bob Miller
Governor
Capitol Complex
Carson City, NV 89710

Dear Governor Miller:

By now you must realize the lengths to which certain officials are extending themselves in order to disintegrate the constitutionally constituted court in Case No. 24598. I sincerely hope and trust that you will honor my request to replace Sr. Justice Zenoff and District Judge Addeliar Guy with District Judge John Davis and Sr. District Judge Joseph McDaniel.

I *assure you* that I have not discussed the merits of this case with either judge, and have in fact only determined from them that they would be willing to sit on the case. I personally do not know Judge Davis, and have had only occasional contact with Sr. Judge McDaniel when we both were on the State-Federal Judicial Council together. I believe him to be a totally honorable and ethical judge. I have also heard nothing that would indicate to the contrary concerning Judge Davis.

Governor, I don't pretend to know all the motives behind the extremely deleterious history of the *Whitehead* case, but I can personally assure you that the *Whitehead* panel has served with ethical exactitude and honor. I firmly believe that our citizens are entitled to know the truth regarding that case, and why it has created such terrible damage to the judiciary in general, and this court and certain of its justices in particular. I assure you that I am not driven by a spirit of revenge or vendetta. My only compelling desire is to see, to the extent it is possible, that the court in Case No. 24598 is vindicated and that our citizens can once again have greater reason to

believe that the judicial branch of government is deserving of respect in this jurisdiction.

Thank you for your consideration.

Sincerely,

THOMAS L. STEFFEN

EXHIBIT D

[SEAL]

STATE OF NEVADA
EXECUTIVE CHAMBER
Capitol Complex
Carson City, Nevada 89710

January 12, 1996

BOB MILLER
Governor

The Honorable Thomas L. Steffen
Nevada Supreme Court Chief Justice
Capitol Complex
Carson City, Nevada 89710

Dear Chief Justice Steffen:

I am in receipt of your letters dated December 20, 1995 and January 10, 1996 wherein you have requested that I appoint District Judge John P. Davis and Sr. District Judge Joseph O. McDaniel in the place and stead of District Judge Addeliar Guy and Sr. Justice David Zenoff, respectively, in the matter of case number 24598.

I appreciate your strong belief in the stance you have taken; however, you must also recognize the legal dilemma with which I am faced. I have not contacted the Attorney General for advice on this matter as it would be legally inappropriate due to her office's involvement in case number 27847.

After considerable research and advice from my in house legal counsel and in light of the Order entered December 28, 1995, I am of the belief that I do not possess the authority to make such an appointment absent a consensus of the elected court's majority.

Sincerely,

/s/ Bob Miller
BOB MILLER
Governor

BM/cmc

EXHIBIT E

SUPREME COURT OF NEVADA
Thomas L. Steffen, Chief Justice
Capitol Complex
Carson City, Nevada 89710

[SEAL]

January 16, 1996

Hon. Bob Miller
Governor
Capitol Complex
Carson City, NV 89710

Re: Appointment of Replacement Judges in Case No. 24598

Dear Governor Miller:

We are in receipt of your letter of January 12, 1996, regarding the referenced matter. Although we are extremely disappointed in the unprecedented denial of Chief Justice Steffen's request for substitute jurists in Case No. 24598, we respect the fact that the circumstances surrounding what should have been a routine request have been somewhat complicated, at least on the surface.

Governor, we are obviously not aware of the "considerable research" and advice that you received and acted upon from your in house legal counsel, but respectfully suggest that the reseearch and advice overlooked some fundamental truths and principles that should be dispositive of the legal dilemma that you alluded to in your letter. As a result, the undersigned justices, as a majority of the elected justices qualified to sit on Case No. 24598, have determined to hereby seek your reconsideration of Chief Justice Steffen's earlier request in order to avoid further delay in the achievement of the court's responsibilities in finalizing that highly important case.

Preliminarily, and perhaps least significantly, the Order of December 28, 1995, signed by Justice Young, Rose

and Shearing, and to which you make reference in your letter, has no legal validity since it violated the Order signed by all five justices dated December 23, 1994, which required all court rule changes to occur in a duly noticed public hearing. *See* attached Exhibit A.

Supreme Court Rule 11 states clearly, in pertinent part that: "(2) Whenver *the chief justice* determines that it will promote the effective administration of justice . . . . [i]f designated by the governor, *at the request of the chief justice,* a former district judge may be assigned, as a judge pro tempore, to hear specific cases in the supreme court upon disqualification of a justice thereof." (Emphasis added.)

Finally, on this point, under Art. 6, § 4 of the Nevada Constitution, "[i]n case of the disability or *disqualification,* for any cause, of the chief justice or one of the associate justices of the supreme court, or any two of them, the governor is authorized and empowered to designate any district judge or judges to sit in the place or places of such disqualified or disabled justice or justices . . . ." (Emphasis added.)

Governor, we suggest that it is of the utmost importance that you consider the fact that under no circumstances can the "Order" of December 28, 1995, provide any authority in the two disqualified justices to act in determining any aspect of the future of Case No. 24598 or who will sit on that panel. Indeed, in the very rule invoked by the three justices in their Order of December 28, 1995, it is absolutely clear that neither Justice Rose nor Justice Young can participate in the selection of substitute jurists in the referenced case. Rule 7 (5) provides as follows:

> In the event the Chief Justice or the Vice Chief Justice is either disqualified or wishes to recuse himself in regard to the decision of any litigated matter, he is also precluded from undertaking any administrative action with regard thereto. This preclusion

> includes, but is not limited to, the assignment or direction of court personnel to review files of the case in question *and the selection of any substitute jurists to participate in the court's decision.*

(Emphasis added.) When Justice Rose recused himself from Case No. 24598 on January 14, 1994, as a result of a motion to disqualify, he was then Chief Justice. Under Rule 7, he is clearly barred from acting in the selection of any substitute jurist on that case. Similarly, Justice Young, who recused himself from the inception of Case No. 24598, is the Vice-Chief Justice of the court and is also disempowered to participate in the selection of a substitute jurist under Rule 7. It is therefore clear that it would be impermissible for Rose and Young to participate in any recommendation to you concerning replacement jurists in Case No. 24598. Of the remaining three *elected* members of the Nevada Supreme Court, the undersigned two justices constitute a majority of the three, and again request that you appoint the two substitute jurists previously submitted for your action.

As early as 1886 this court recognized and held that when plaintiffs sought an extension of time within which to file amendments to a motion for a new trial from a judge who was disqualified to sit in the same case,

> [t]he application to the judge, who was disqualified, might as well have been made to a stranger having no authority to act. If it had been granted, the order would have been absolutely null and void. Under these circumstances, the case must be treated as if no application had been made for any extension of time to file amendment.

Frevert v. Swift, 19 Nev. 363, 365, 11 Pac. 273, ——, (1886). In effect, the two disqualified justices, Young and Rose, combined with the lone dissenter in Case No. 24598, Justice Shearing, are attempting by the irregular order of December 28, 1995, to either control appointments to the court in Case No. 24598, or to render that

court impotent by blocking the appointment of substitute judges in that case. This they may not do under any ethical or legal rule or principle.

Governor, we cannot possibly overstress the importance of the executive acting in order to allow the processes of the judicial branch to continue unimpeded by those who, notwithstanding their disqualification in Case No. 24598, have taken every conceivable measure to prevent the court in the referenced case from fulfilling its obligations. The remaining responsibilities of that constitutional tribunal have been settled in the court's decisions and are irrefutably the law of the case.

There are no lawful or constitutional methods for frustrating the duties of the court in Case No. 24598. If the judicial course of that court is to be derailed, it must be through the illegitimate use of raw power through a combination of forces within the judicial and executive branches of government. We sincerely hope and trust that you will not permit this to occur.

Eventually, all actions with respect to Case No. 24598 will be scrutinized by objective and impartial sources. We are fully prepared to justify the judicial fidelity and exactitude with which the court has acted in Case No. 24598. We trust that you will now assist us in ensuring that history will reflect that the entire unfortunate and tortured course of that case will be honorably brought to a close with the highest level of public illumination.

Thank you for your consideration.

Sincerely,

/s/ Thomas L. Steffen
THOMAS L. STEFFEN
Chief Justice

/s/ Charles E. Springer
CHARLES E. SPRINGER
Justice

Attachment

EXHIBIT F

[SEAL]

THE STATE OF NEVADA
OFFICE OF THE GOVERNOR
555 E. Washington Avenue
Suite 5000
Las Vegas, Nevada 89101

January 29, 1996

BOB MILLER
Governor

Justice Thomas Steffen
Justice Charles Springer
Nevada Supreme Court
Capitol Complex
Carson City, Nevada 89710

Dear Justices Steffen and Springer:

On December 20, 1995, Justice Steffen requested that I name replacements for Judges Guy and Zenoff to the so called "Whitehead Panel." As you are aware, I informed Justice Steffen that his request did not comport with the requirements specified in an Order of the Supreme Court filed December 28, 1995, as it was not signed by a majority of the elected members of the Court, and I was thus precluded from granting it.

I have and will continue to respond to orders of the majority of the elected members of the Supreme Court. If, in fact, you provide me with a request for appointment to the Whitehead panel signed by a majority of the elected members, I will comply. Until that time, I respectfully decline your request that I reconsider my decision.

Sincerely,

/s/ Bob Miller
BOB MILLER
Governor

BM/cmc

EXHIBIT G

[Filed Jul 30, 1993]

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 24598

IN RE PETITION FOR A WRIT OF PROHIBITION OF IN THE ALTERNATIVE FOR A WRIT OF MANDAMUS

CONFIDENTIAL ORDER

We have considered the petition on file herein, and respondent's emergency motion for a review of this court's order of July 22, 1993. Cause appearing, we grant the emergency motion insofar as it challenges that portion of our order of July 22, 1993, that requires respondent, on or before August 2, 1993, to "provide to petitioner a list of all persons outside the members of the Commission who have been contacted by any person purporting to act with the authority of the Commission and advised of the pendency of an "investigation' or 'proceeding' against petitioner, and all other matters required to be disclosed pursuant to ARJD 14(5) . . . ." Accordingly, we relieve respondent of the obligation to comply with this quoted portion of our order of July 22, 1993, pending further order of this court.

In all other respects, we deny respondent's motion, and we specifically reaffirm each and every remaining provision of our order of July 22, 1993. Specifically, all proceedings before and actions of the Commission relating to this matter, and the actions of those acting on behalf of the Commission, shall remain stayed, including the filing of any answer to any pleading, the holding of any hearing, and the conducting of any further investigation. Further, the Commission must advise each person notified of or re-

quested to appear at a probable cause hearing that they should not do so pending further notice. The Commission and all persons purporting to act pursuant to its authority shall maintain strict confidentiality concerning the proceedings below, and shall maintain the confidentiality of this proceeding before this court. All pleadings and documents submitted for filing in this case shall be filed under seal and shall contain the caption as set forth in this order. All documents shall be submitted for filing by delivering them personally to the clerk of this court, Janette Bloom, or the chief deputy clerk, Jeanne Richards.

Finally, respondent shall file an answer to this petition as required by our order of July 22, 1993.

It is so ORDERED.

/s/ Rose, C.J.

/s/ Steffen, J.

/s/ Springer, J.

cc: Hon. Frankie Sue Del Papa, Attorney General
Brooke Nielsen, Deputy Attorney General
Donald J. Campbell
Guy Shipler, Chairman, Nevada Commission on Judicial Discipline
Ohlson & Springgate

APPENDIX H

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 24598

IN RE PETITION FOR A WRIT OF PROHIBITION
OR IN THE ALTERNATIVE FOR A WRIT OF
MANDAMUS

THE HONORABLE JERRY CARR WHITEHEAD,
Petitioner,

vs.

NEVADA COMMISSION ON JUDICIAL DISCIPLINE,
Respondent.

DEPOSITION OF

PAT LUNDVALL

SATURDAY, SEPTEMBER 2, 1995

RENO, NEVADA

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[5] RENO, NEVADA, SATURDAY, SEPTEMBER 2, 1995, 9:30 A.M.

PAT LUNDVALL

having been duly sworn,
was examined and testified as follows:

EXAMINATION

BY MR. AHLSWEDE:

Q. Let the record show that Pat Lundvall is appearing here this date, September the 2nd, 1995 pursuant to a subpoena duces tecum issued out of the Supreme Court yesterday, and that she is not voluntarily appearing but appearing pursuant to an order of the Supreme Court.

Would you state your name, please?

A. My full name is Patricia Kay Lundvall, I go by Pat Lundvall.

Q. And your address?

A. 2620 Lakeridge Shores West, Reno, Nevada 89509.

Q. And what is your occupation?

A. I'm an attorney.

Q. Ore you practicing with a firm at this time?

A. Mc Donald, Carano.

[6] Q. How long have you practiced law?

A. I was admitted to the bar in September or October of 1989, I took the bar in July of 1989.

Q. Are you a member of the bar of any other state?

A. No.

Q. And you are licensed in Nevada?

A. Yes, I am.

Q. Presently with the Mc Donald firm?

A. Yes.

Q. Were you formerly with the law firm of Morris, Brignone and Pickering?

A. Yes, I was.

Q. For the sake of brevity in this, all further questions relating to the firm of Morris, Brignone and Pickering, we'll refer to it as the firm, is that acceptable to you?

A. Yes, it is.

Q. When did you begin your service or your employment with the firm?

A. February 12th, 1993.

Q. And what was your position there?

A. I was an attorney, I ran the Reno office of Morris, Brignone and Pickering.

Q. Where is that office located?

[7] A. We had offices on 50 West Liberty. It was in the Weigand Center. We had space on the first floor, and the suite number was either suite A or suite 100, depending upon how you looked at the directory.

Q. What did you do before you were with the Pickering firm—Or the firm?

A. I started with Morris, Brignone and Pickering after leaving Lionel, Sawyer and Collins, I began my legal career here in the State of Nevada being employed with Lionel, Sawyer and Collins.

Q. Was that in the Las Vegas office?

A. No, it was in the Reno office.

Q. Did you ever practice or did you ever work out of the Las Vegas office?

A. No, I did not.

Q. Morris and Pickering were also with Lionel, Sawyer; is that correct?

A. Yes, Steve Morris, Kris Pickering, Andy Brignone and myself, we were all with Lionel, Sawyer, all four of us left Lionel, Sawyer to set up our own firm, so to speak.

Kris Pickering used to practice out of the Reno office of Lionel, Sawyer and Collins before she relocated to Las Vegas and was associated there with the Las Vegas office of Lionel, Sawyer and [8] Collins.

Q. And when you joined the firm in '93, is that when the firm was actually formed?

A. I believe the official date that Kris and Steve construed the firm being created was January 1st of 1993.

Q. And you were basically with the firm from its creation?

A. I was involved with the firm from the day after I was informed that they had announced that they were leaving Lionel, Sawyer.

They announced that they were leaving Lionel, Sawyer at the very end of December of 1992.

I was called the next day, informed that they had made that announcement, and Kris had asked me if I was willing to join the new organization that they were going to form.

Q. And you of course said, yes, apparently, since you joined the firm?

A. After a number—After a lot of soul searching, after a lot of promises that were made to me and after what appeared to be a phenomenal opportunity for a young attorney, yes, I did.

Q. All right.

When you were with the firm did you become [9] aware of a judicial discipline case involving Jerry Carr Whitehed?

A. Yes, I did.

I don't think you could be a member of the legal community here in the State of Nevada without being aware of that.

Q. All right.

Rather than use that term, the judicial discipline case involving District Judge Jerry Carr Whitehed, I'll just refer to it as the Whitehead case from now on, is that acceptable to you?

A. Yes, it is.

Q. How did you first learn about the Whitehead case?

A. I'm trying to think of my first awareness of it, and I believe my first awareness of it was by reason of the newspaper when I was still at Lionel, Sawyer.

I'm not really—It's difficult to place an absolute beginning date on a matter that has spanned such a lengthly period of time.

Q. And do you recall when that was, approximately?

A. I remember that there was in the legal community in general as to—Or speculation that there [10] were a number of people that were filing complaints with the judicial discipline commission against Judge Whitehead, and I think it was probably through that just general rumor mill, grapevine, lunchroom talk that maybe that's how I became aware of it.

Q. And as I understand, your entire service with Lionel, Sawyer and subsequently the firm was in the Reno office; is that correct?

A. Yes.

Q. At the time you first learned about the Whitehead case, then, it was public knowledge; is that correct?

A. I believe so.

Q. Since you mentioned that you had heard about it in the newspaper?

A. Yes, I believe that it was something that was of public knowledge specifically addressing Judge Whitehead.

Q. But it was through the newspaper that you first became aware of it; is that correct?

A. Frankly—

Q. Or talk within the legal community?

A. One or the other, I believe so. But I'm not entirely certain on this particular point.

Q. After you learned of the Whitehead [11] investigation, did there come a time when Morris, Steve Morris and Kris Pickering became particularly interested in it or expressed any interest, or their interest to you?

A. My first recollection as to the specific interest that was expressed by Steve Morris in particular as it related directly to the Whitehead matter was an evening in the summer of 1993, we were in the office, the Reno office of Morris, Brignone and Pickering.

There was mention made by Steve that there was some type of a confidentiality order that had been entered, and that it concerned Judge Whitehead, and the complaints

that had been filed with the judicial discipline commission against him.

He was dying to get his hands on a piece of paper that he could send off to the newspaper to inform them of the specifics of certain of the complaints that had been leveled against Judge Whitehead, and I remember this very vividly, him almost dancing around the office and being quite agitated, and being quite animated concerning this.

He stated to me that if he had such a piece of paper that what he would do is to Fax it to the newspapers, and he would do so by going to a [12] grocery store or someplace where the Fax could not be traced as to its location.

That's my first vivid or specific recollection of Steve Morris's interest in the Whitehead matter in particular.

Q. At that time did he know that the Whitehead investigation should be held in confidentiality?

A. He lead me to that belief.

The reason I say that is on a number of factors he made mention of a confidentiality order.

I don't believe he made mention as to where that order originated from.

He also was very specific about not wanting to have the written piece of paper or tht Fax be able to be traced so his identity and his involvement in it could not be identified.

I suppose when you couple a number of things together and you draw your own conclusion and you make an assumption based upon a number of factors that were said, he lead me to the firm belief that this was a—Or supposed to be a confidential issue.

Q. Did he say what kind of a piece of paper he wanted, that he would Fax?

A. He stated that anything to be able to give [13] the press some specifics as to the allegations that had been leveled against Judge Whitehead.

Q. Do you know whether in fact he ever obtained such a piece of paper?

A. I don't believe so. Not that evening.

Q. Do you know if he ever was able to secure such a piece of paper?

A. I don't know if it was that particular evening or not.

May we take a short break here, please?

Q. Okay.

MR. AHLSWEDE: Off the record.

(A recess was taken.)

(The record was read by the reporter as follows:

"QUESTION:—Do you know if he ever was able to secure such a piece of paper?")

BY MR. AHLSWEDE:

Q. To what piece of paper do you refer?

A. It was my understanding that Steve knew of my awareness because of my involvement in a case that I handled as a young associate when I was at Lionel, Sawyer and Collins.

There were—Or there was a letter that had been given in some form to an attorney at Lionel, [14] Sawyer and Colins.

That attorney had shared that letter with me and it involved Judge Whitehead and allegations against him, in particular concerning peremptory challenge.

I know that I had discussed that letter at length with Kris, who throughout the majority of my legal career up to a very decided point was my confidante, was my mentor, and I shared the information concerning that letter, and it was my understanding that Steve was well aware of that letter and was seeking then that letter that set forth specific allegations against Judge Whitehead so that he could send that letter on, then, to the newspapers so they could have awareness of the specific allegations being leveled against Judge Whitehead.

Q. At that point did Steve ask your secretary—First, he knew of the existence of that letter.

A. That's my understanding, yes, that's my recollection.

Q. Because of a case that you had handled while you were with Lionel, Sawyer?

A. Yes.

Q. And he asked your secretary to find the [15] letter; is that correct?

A. Yes.

Q. And can you briefly describe the efforts that he went through at that time to try to find the letter?

A. We had not been in our new space for very long, and my recollection is it was about three, four, maybe five months or so, while things were pretty well put together.

We still had a lot of stuff in boxes, old chron files, and when I say chron files I'm talking the chronology files that my secretary maintains during the course of handling particular cases, old daytimers and calendars, things of that nature, and so my recollection is basically having the office turned upside down looking into every file drawer that we had, looking into every box of documents in an effort to search for that particular letter.

Q. Do you know who wrote that letter?

9. I believe so, but I'm not—

Q. Who do you think wrote the letter?

A. I think that Judge Peter Breen wrote the letter.

Q. And do you know to whom the letter was addressed?

[16] And by that I mean the actual letter, not the copy furnished, but do you know to whom the letter was addressed?

A. I have a vague recollection of the letter being addressed to an entity that was involved in the disciplining of judges.

At that time that I saw the letter did I have a specific awareness of the name of that particular entity? No.

Do I have a vague recollection that—That it was some association or some entity involving judges and their discipline? Yes.

Q. Could it have been the Nevada Judicial Discipline Commission?

A. It could have, but I do not have—

Q. You don't remember a specific name?

A. Yes.

Q. And was that letter in a complaint form? That is to say, it was Judge Breen writing to this entity to complain and form a basis of a complaint against Judge Whitehead?

A. A complaint to me has very specific terminology, and I use that in the sense of a complaint used to initiate litigation within the court.

As I understand it, complaints to—Like [17] the State Bar or to the Judicial Discipline Commission can take letter format, and so to the extent that this letter may have been a complaint, then that is possible, yes.

Q. It could have been the letter that initiated one of the—Forming the basis of one of the charges against Judge Whitehead; is that correct?

A. It could have been, yes.

Q. In any event, the letter to which you are referring to was addressed to—Not to Lionel, Sawyer, not to an attorney at Lionel, Sawyer, but rather to the entity involved with discipling judges.

A. I think so, and I don't mean to equivocate on this, but I don't have a specific recollection that that's to whom it was addressed or to an entity that it was addressed.

I remember specifically it being shared with me by an attorney at Lionel, Sawyer, and he had received either a copy of that letter, and he had shared that copy with me, and that's how I knew of its existence.

Q. This was not the original letter; is that correct?

A. I don't believe so.

Q. To the best of your recollection it was [18] not the original letter?

A. No.

Q. Who was the attorney at Lionel, Sawyer and Collins that shared that letter with you?

A. Richard Horton.

Q. Do you know what happened to that copy that was shared with you by Horton?

A. No, I don't, and I thought frankly that I had retained a copy of that letter or had been given a copy for my files of that letter, but I have never been able to find that so I don't know if it was something that was shared to me and asked to be given back.

So I don't have a specific recollection on that point, no.

Q. Do you know how Steve Morris first became aware of that, the copy of that letter?

A. I'm almost positive that that would have been shared with him by Kris Pickering.

I know that I shared that letter, its presentation to me, the contents of the letter with her.

Q. At the time you shared that with Kris Pickering were you aware that it was possibly a complaint that would initiate charges against Whitehead or was it just a letter complaining about his [19] basically—In general terms complaining about his conduct?

A. Just in general terms. I had no knowledge or awareness as to how the system worked in any way, shape or form.

Q. And this was just another letter as far as you were concerned that was complaining about Judge Whitehead's—

A. I was a young pup attorney, not intimately familiar with all of the ins and outs of judges and their systems and their discipline and things of that nature, no.

I had no knowledge as to what its specific purpose or intent was.

Q. And at that time you didn't know about what constituted a formal complaint to the Judicial Discipline Commission?

A. No.

Q. Whether it is a printed form like a civil complaint or a criminal complaint or just a letter?

A. That's right.

A complaint, like I said to me, is something that is very specific, it has a caption, a plaintiff, a defendant; it's entitled a complaint; it's filed within a court system, assigned a number, [20] department number; you have specific allegations that are supposed to be on there, and it has, you know, the attorney's signature on it or a pro per signature or whatever.

That to me is a complaint.

As to now having knowledge that you can file a complaint against an attorney with the State Bar in the form or against a judge with the State Judicial Discipline Commission in letter form, I believe I have that knowledge now.

Did I have that knowledge at the time? No.

Q. Do you think you would recognize that letter if you saw a copy of it, if I was able to secure a copy of that letter and show it to you—Not today, obviously, I can't get it today—But if I were able to secure a copy of that letter do you think reading it might—You might be able to identify that as the letter to which we are now referring?

A. I'd sure try.

Q. All right.

I take it, then, that the letter was not found that evening.

A. No, it was not.

Q. Do you know whether it was ever [21] found?

A. I don't believe so.

Q. And it was in a casual conversation that you had with Kris Pickering that Kris Pickering became aware of the letter; is that correct?

A. Yes.

Q. And she made Steve Morris aware of the letter?

A. Yes, I assume so.

One of the things I think that is maybe helpful to understand, that up until about the time that I left Morris, Brignone and Pickering, Kris was a very good friend of mine, in addition to being my mentor.

I don't know that there were any aspects of my life that I did not share with her.

Q. Do Morris and Pickering—they are husband and wife; is that correct?

A. Yes, they are.

Q. And do they live in the Reno area or the Las Vegas area?

A. Las Vegas area.

Q. At the time that this occurred were they living in Reno?

A. At the time—Let me give you a little [22] history here.

When I started at Lionel, Sawyer in 1989 Kris and Steve were not married. Kris and Steve were married in the summer of 1992 after some problems that Kris had in the Reno office of Lionel, Sawyer and Collins.

When they became married, then that's when she relocated to Las Vegas, and that's when I understood them to begin living, you know, in Las Vegas.

From 1989—Or actually from 1988 when I first met her, because I did a summer clerkship at Lionel, Sawyer and Collins, to 1992 Kris always resided here in Reno, and Steve resided in Las Vegas, and they had a distance romance, or a distance relationship, I guess would be a more appropriate term.

Q. Do you know why Steve was interested in getting some information to the press about Whitehead's alleged misconduct?

A. I remember one comment that he made that he thought that Justice Gunderson had some type of a hand in the matter.

From that I guess one can make certain assumptions or certain inferences, but as to him [23] specifically stating to me, "This is why I want to do that," I don't think that he ever did.

Steve is not the type of person that shares an excessive amount of information with others.

Q. Do you have an opinion as to why he would want to discredit Whitehead in any way?

A. I don't know that Steve Morris had real animosity toward Judge Whitehead.

I think if there was any animosity that Steve Morris bore it was against justice—Former Justice Gunderson, and maybe various members of the Nevada Supreme Court.

Q. Do you know why he had animosity towards Gunderson or the former members of the Supreme Court?

A. It was one very specific case that I recall he and Kris being involved in, that they lost and it was a very bitter loss, and there were a number of personal statements that had been made and an opinion, for lack of a better word, against Steve Morris, and the understanding that I had as to his animosity towards former Justice Gunderson as well as other members of the Supreme Court dealt with cases that he and Kris had handled and had lost.

[24] There was always the idea that I had in working with them that they always thought that there was some wrongdoing with the cases that they lost.

In other words, there was always the allegation if there was a jury trial that the jury had been tampered with, if it was a Nevada Supreme Court, that some member of the court had been bought off; if it was a Ninth Circuit Court of Appeals the Supreme Court was trying to influence the Ninth Circuit Court of Appeals by handing down decisions, and then the Nevada Supreme Court had

been bought off in doing that; those were the constant kind of allegations that were being made against the Nevada Supreme Court against former Justice Gunderson.

Q. Do you know the names of any of the specific cases?

A. Yes, I do. Ainsworth combined is the one that sticks out most promptly in my mind as being the bitterest contest between Kris and Steve on the one hand in their representation of a client, and the Nevada Supreme Court on another.

It was a case that I believe has two reported decisions in the Nevada Supreme Court and that is the case in which there was very bitter feelings by Steve toward former Justice Gunderson because of the [25] Nevada Supreme Court's handling of that case.

I remember that being a case that Kris was personally so caught up with that when the—There was a writ of certiorari that had been filed with the U S Supreme Court, and I remember when that writ of certiorari came down her just sobbing, almost uncontrollably when they lost.

Q. The petition for writ of certiorari was denied?

A. Was denied, and it was something that she was very wrapped up in and she thought that there was somehow wrongdoing by the Nevada Supreme Court associated with their handling of that case.

It was played out in the newspapers, and that was finalizing during my first few days at Lionel, Sawyer and Collins, and that was my first introduction to her and to Steve and their involvement with the politics, for lack of a better word, with the court.

Q. Do you know of any other cases which was the source of animosity?

A. We had a decision, or we had a case that we were handling on behalf of Hilton Hotels that we referred to in house as Hilton-Brooks.

It dealt with the 37 dealers in Las Vegas [26] who had sued the Hilton Hotel. They had a very large judgment

that had been imposed against them, and Lionel, Sawyer and Collins had been retained to handle the appeal work, and during the course of that appeal work there were two decisions in particular handed down by the Nevada Supreme Court that significantly impacted the argument that we were making in the Court of Appeals, and I remember Kris being convinced or telling me that she was absolutely convinced that members of the Nevada Supreme Court had been bought off and that they had orchestrated the timing of their issuance of those opinions as well as the content of those opinions to specifically derail the argument that we were advancing in the Ninth Circuit.

Q. Do you remember the names of the cases to which you refer?

A. Western States was how our office referenced to it, and the other one was DeAngelo. Both of them are employment law cases.

Q. All right.

Getting back to Steve Morris, if you said that he bore no animosity toward Whitehead personally, why do you think that he was interested in securing a document that would hold Whitehead up to contempt, for want of a better word, by furnishing it to the [27] newspaper?

A. My impression was never that the—Let me back up and say this: From the standpoint of who he was directing his frustration, his anger and his animosity at, it was to the Nevada Supreme Court, and who—And former Justice Gunderson, and that he thought that former Justice Gunderson had some kind of continuing involvement with the Nevada Supreme Court, and so it was as if his anger and his frustration was with the court as an entity and what they were doing in contrast to Judge Whitehead as an individual.

Q. How would that anger translate to a desire to hold Whitehead up to ridicule by releasing some documents?

A. It was almost as if the circumstance regarding Judge Whitehead was fortuitous in that he claimed that their attempt to maintain the confidentiality of those com-

plaints was not appropriate for the court to do, and therefore he was trying to hold the court to ridicule, and if there was someone else that went along with that, then too bad for them, but he really didn't care.

Do you mind if we go off the record?

(Discussion off the record.)

MR. AHLSWEDE: Would you read back my last [28] question, please?

(The record was read by the reporter as follows:

"QUESTION: How would that anger translate to a desire to hold Whitehead up to ridicule by releasing those same documents?")

BY MR. AHLSWEDE:

Q. Do you believe or was it your impression that the ultimate vendetta, if anything, againust Whitehead was—that's not a good question.

Do you believe that Steve Morris's anger was directed at Whitehead or in an attempt to discredit Whitehead for anything Whitehead had personally done, or were there other reasons?

A. No, I believe that Judge Whitehead was a fortuity, or was a pawn, however you want to describe him.

The Whitehead matter was a way, under my opinion and based upon, you know, a number of little pieces of information that you put together, if there was any vendetta, animosity, it was directed towards the Nevada Supreme Court.

Steve's anger, his frustration, his hatred was of various members of the Nevada Supreme Court and [29] Justice Gunderson.

Q. Who did Steve Morris indicate his hatred was towards on the Supreme Court?

A. Charley Springer was one in particular that comes to mind.

The reason I say that is I'm going to relate a conversation that Steve had with me as it related to trying to convince another judge to run for Justice Springer's seat.

At one time he informed me that he had gone to—at that point in time Judge Mariam Shearing in Las Vegas, and either she had expressed an interest in running for the court or he was trying to convince her to run for the court, one way versus another, but it was for Justice Springer's seat. He wanted Justice Springer out or off of the Nevada Supreme Court, and he was trying to convince Mariam Shearing then to run for that seat.

He was frustrated with her; he expressed this to me. He told me that he was frustrated with her when she decided to run against Chuck Thompson, and the race for what I understood was an open seat on the Nevada Supreme Court.

Chuck Thompson was a personal friend, as I understood it, of Steve Morris, and he on a number of [30] occasions made reference to the fact that he had Chuck Thompson in his pocket, and that he thought also that Chuck Thompson would be a good addition to the Nevada Supreme Court, and he was frustrated Mariam Shearing had elected to run against Judge Thompson rather than to vie for Justice Springer's seat.

In fact, I remember attending Kris and Steve's wedding in Las Vegas when it was held in the spring of '92, and that it was then Judge Thompson who married them, who conducted the ceremonies.

Q. And so Morris conveyed the impression to you that he wanted to use Whitehead not because he had a vendetta against Whitehead, but to embarrass and discredit the Supreme Court?

A. Yes.

I never got the impression from either Kris or Steve that they had any personal animosity toward Judge Whitehead.

In fact, I can say directly from Kris's standpoint that she and I had talked of Judge Whitehead and his ability as a judge on the bench.

When he first began practicing law there was rumor going through the community that Judge Whitehead was not receptive to female attorneys.

I had shared that with Kris and Kris had [31] disabused me then of that idea, and I can tell you from experience that I personally have never felt that I as a female practitioner had any problem in his courtroom, and I have been in his courtroom on a number of occasions and have a number of cases filed in front of Judge Whitehead.

And Kris and I had talked in general terms about our appearance in front of him and his handling of cases, and she used to speak quite highly of Judge Whitehead and used to boast about her success in front of Judge Whitehead, and therefore my impression was that she in particular did not bar any ill will or animosity, at least at the time that we were having these discussions, against Judge Whitehead in particular.

Q. Do you know who made the original leak to the press? Or if you don"t know, do you have any opinion as to who made the original leak to the press about Whitehead?

A. I don't have direct knowledge of that.

I have phone records that reveal there were numerous calls that were being exchanged between members of the press, for example, A D Hopkins, Steve Timko.

Because of the phone records and the [32] subsequent order that I was given while employed at Morris, Brignone and Pickering to destroy those phone records, coupling that information together in conversations that I had with Steve, I have an impression, but if you're asking me if I have direct knowledge, did I say it was the end of the telephone call or did someone tell me directly, no, I do not.

Q. I get the impression from what you have testified to up to this point that a person or persons unknown had caused some public disclosure of the Whitehead case, and that Morris and Pickering saw that as an opportunity to

exploit their dislike for the Supreme Court in trying to amplify, if you will, the Whitehead case.

They were not the original leaks, but they capitalized on those leaks by adding to them. Would that be a fair statement?

A. The majority of your statement is fair. I think that there's one caveat that needs to be made to it.

You indicated whether or not I believe they were the original source of the leaks. I believe they may have been the original source of those leaks, but I don't have direct knowledge of that.

[33] Do I agree with you that they capitalized on what was being done?

It appears so, yes, but what I'm saying is this, is that based upon the phone records that I have, the destruction of those phone records that was subsequently given to me, the conversations that I had with Steve Morris, the conversations that I had with Kris Pickering lead me to believe that they may have been the original source of those leaks.

Q. At the beginning of your deposition I asked you how you became aware of the Whitehead case, and you said it was a topic of conversation among members of the bar; is that correct?

A. Yes.

Q. And what I'm trying to find out is—I'm trying to trace it back as to how it became the topic of conversation among the bar, since it was supposed to have been confidential, whether—And if Morris or Pickering started it or whether they learned of the Whitehead investigation through the common talk of the bar and then decided to capitalize on it.

A. That I don't know that I have any direct knowledge of, like I said, you know, for a period of time there was a lot of gossip going on in the bar and I don't exactly remember when it started, and therefore [34] from the point of view when Kris and Steve learned of it, that I don't know.

It's kind of like something, it's like the little snowball that rolls down the hill, you don't exactly know where it began to pick up speed and where it originated from.

All of you know at the bottom of hill it got big, and you can trace points backwards, but I can't tell you the specific origin of that.

Q. But you said in your opinon the origin may very well have been with the firm?

A. It may very well have been.

Q. And would you—Do you have an opinion as to how the firm came to find out about the complaints against Whitehead?

A. That I don't know.

The only thing that I have—Like I said, a vivid recollection of, is when there was a statement made by Steve that there was now an order by which things were supposed to be confidential, and so if prior to that point in time things were supposed to be kept confidential, I'd never had any direct conversations with him on that, or I never had any direct conversations with Kris on that issue either, nor did I have any direct conversation with anybody [35] else, quite frankly, concerning that.

Q. Well, assuming that a complaint against a judge is initiated by a letter to the Nevada Judicial Discipline Commission, that would start an investigation against a judge, the commission reviews that letter complaint.

At that point it's supposed to be confidential and the letter is theoretically written by the complainant to the Judicial Discipline Commission.

I'm wondering at this point how Steve or Kris may have become aware of a complaint having been filed, trying to get back to the source, there had to be possibly a leak somewhere along the line, if there's—the complainant writes to the commission, theoretically there are two entities involved, the complainant and the commission.

Now, somewhere either in the commission or by the complainant, the complainant tells friends, associates, the press or somebody like that that, "I have written a com-

plaint against Whitehead," or the commission says, "We have received a complaint against Whitehead," do you have any opinion as to how any of these complaints became the subject of knowledge?

A. No, I don't, and when I referred earlier to—Like I said, the general talk that was in the [36] legal community, the talk in the legal community was not that complaints had been filed.

The talk was of Judge Whitehead's conduct, not that that conduct was the subject of a complaint, but just about his conduct in general, and so that is the general gossip, for lack of a better word, among the legal community that I was referring to.

As to my first specific awareness that a formal complaint had been filed, I suppose reading it in the newspaper would have been, you know, my first absolute "Gee, this judge is in trouble."

But other than that I don't know if I could help you much more than that as to the—How Kris and Steve may have received knowledge as to the specific complaints that had been filed with the Judicial Discipline Commission against Judge Whitehead and what does constitute a complaint at that point.

Q. Was it at the time of the gossip that people were complaining about Judge Whitehead that Steve Morris wanted that particular piece of paper that we refer to as the letter from Judge Breen to probably the Judicial Discipline Commission, a copy of which was given to Horton, do you remember whether he wanted that—Or at the time he wanted that letter, had there been newspaper articles that a complaint had been filed [37] with the commission or just generally people complaining about Judge Whitehead's conduct?

A. No, there had been no newspaper articles to my recollection at that point in time.

On the evening that Mr. Morris—When Steve want to do something to be able to Fax to the newspapers, there had been no newspaper accounts of formal proceedings against Judge Whitehead.

Prior to that there had been, at least my understanding was, you know, general gossip concerning Judge Whitehead in his conduct and that gossip and probably the topic of Judge Whitehead's conduct in the legal community began with the—I think it was called the Kinneman case where there was someone who was beaten, I think at Circus Circus, and there was a criminal case that was handled and there was some press as to a dispute that had arisen between the district attorney Dorothy Nash Holmes at the time and Judge Whitehead, and that appeared to kind of start the legal gossip as to Judge Whitehead, I think.

But as to specific newspaper accounts that the Judicial Discipline Commission, it was investigating Judge Whitehead and what the specific allegations were against him, no, those did not begin until after Steve was looking for something to send to [38] the newspapers.

Q. All right.

You stated that they wanted to see Judge Springer replaced.

Are there any other judges—And that they disliked Gunderson, but at that time he was not seated on the court; is that correct?

A. Yes.

Q. Any other judges that they expressed their displeasure with and wanted to see replaced?

A. From an attorney's perspective when you do specialty work, and I was doing specialty work, you're always talking about the different justices.

The replacement of someone, I remember having a conversation with another attorney in our office who was doing some contract work for the firm.

I remember her telling me how there was an investigation being made into the justice's conduct, in particular Justice Steffen and Justice Springer.

I remember her relating to me that they had photographs purportedly of Justice Steffen coming from Justice Gunderson's home carrying a briefcase.

It was speculated that contained within the briefcase were drafts of the opinion as to the [39] Whitehead matter and that these photographs were going to be used, then, to —They were going to be used in some ongoing investigation that was being made by the FBI into the Nevada Supreme Court.

I have a very vivid recollection of about—Getting that point—To that point in time of saying, "I think that I've heard enough, I don't want to hear any more."

I had already made the decision I was going to leave the firm at that point in time. I was very uncomfortable with events that were happening at the firm, and in particular this was coming after I had been ordered to destroy what I understood to be as relevant evidence at that point in time, and I was real, real uncomfortable.

Q. Who was the contract attorney?

A. Monique Laxalt Urza.

Q. How do you spell her last name?

A. U-r-z-a.

Q. Do you know where she is at this time?

A. I believe—I used to know her by Nikki, I believe that Nikki is still with the firm.

Q. Nikki is still with the firm?

A. With Morris, Brignone and Pickering.

Q. You mentioned an order to destroy certain [40] telephone records.

I'd like to get into that just a little later. I'm not overlooking that, but while the Whitehead case was being investigated, are you aware or do you know whether the firm or any members of the firm obtained copies of the documents that had been filed with the Nevada Supreme Court over the Judicial Discipline Commission?

Had they been able to secure copies of documents filed?

A. I believe so.

The contract attorney, Nikki, that I referred to, I remember having a whole collection of items. Some of those items I recall being newspaper articles, I recall being

briefs, I recall being letters that had been written, I don't recall exactly who they were written to, but my recollection is that there was a whole compendium of materials that had been collected, and that she was using those for purposes of doing—Or as I understood it, doing some research into matters involving the Whitehead matter.

Q. Now, when you say that Nikki was a contract attorney, can you define that, the term "Contract attorney"?

A. At the time that I was at Morris, Brignone [41] and Pickering, Nikki was working on an hourly basis. In other words, she was not a salaried employee, she was not a partner sharing in the draws or anything of that nature.

If she worked ten hours she was paid a specific amount for those ten hours. In other words, her entire hourly amount, then, was being reimbursed to her rather than being a salaried associate or partner attorney, as I understand someone involved with the law firm.

She was carried on our letterhead, she was carried in our newspaper listings and our telephone, listings of that nature, as being a member of the firm, but her financial compensation was such that I construed her to be a contract attorney.

Q. She would be paid for the hours that she put in and that was all?

A. That's right.

Q. Did she work full time, do you know? Or does she work full time?

A. What she does today, I don't know.

When I left she was working a lot, I think somewhere between thirty and forty hours, then, but Nikki's hours were varied, depending on whatever she was working on.

[42] Nikki had a family and she did not want to be a salaried employee responsible for X number of billable hours on an annual basis.

Q. Do you know specifically if any of these documents that she had were obtained from the Supreme Court

or from the Attorney General or from the Nevada Judicial Discipline Commission?

A. I don't know where she obtained them. I do know at one time there was a brief that was given to me that had been filed with the Nevada Supreme Court regarding the Whitehead matter, and at the top of that particular documents there was a Fax tag line.

That Fax tag line indicated that it had come from the Attorney General's office and Steve, Steve specifically when he let me read that said "If you're going to share this with anyone else, make sure you take the Fax tag line off there."

I have specific knowledge as to that conversation, but as to the origin of the other materials that had been obtained, I don't know what that origin was.

Q. But this brief to which you refer, bared a file stamp filed in the Supreme Court; is that correct? Or was this a brief to be filed?

A. You know, I don't know the answer to [43] that.

I don't have a recollection of seeing a file stamp on it. It was my impression that it had been filed because it was a brief that had been filed by Judge Whitehead by and through his attorneys, Hamilton and Lynch.

That was the brief that the request for the appointment of the special master was made by Judge Whitehead, and that is the document, then, that in my opinion preceded the order for me to destroy certain documents and evidence that were within the custody and control of my office.

I need to take a break.

(A recess was taken.)

MR. AHLSWEDE: Would you read the last question please?

(The record was read by the reporter as follows:

"QUESTION: But this brief to which you refer, bared a file stamp filed in the Supreme Court; is that correct? Or was this a brief to be filed?")

BY MR. AHLSWEDE:

Q. This brief to which you refer was the brief filed by Whitehead in which he asked for the [44] appointment of a special master; is that correct?

A. Yes.

Q. And following—And you think that that brief, or you do know that that brief was faxed to the firm by the attorney general?

A. Yes, and the reason—

Q. You saw the tag line?

A. I saw the Fax tag line at the top and was instructed to take the Fax tag line off of the pages if I shared the brief with anyone else.

Q. Did you in fact take the Fax tag line off?

Did you share the brief with anyone else?

A. I don't have a recollection of doing so.

I think I probably took the Fax tag line off in the event I did, but do I remember telling anybody about it? I don't think so.

What I remember after seeing that brief, Steve and I had a conversation; he was in the office, in the Reno office, and he either received that brief or brought it with him, I don't recall one versus another, and he said, "Look at the latest thing that Whitehead has filed, he wants a special master appointed, the special master is supposed to investigate the leaks to the newspaper that were in [45] violation of the confidentiality order. They're asking for the special master to be given subpoena power and that subpoena power could get at a lot of people's documents in a lot of attorney's offices."

And I remember making a comment to him that—in an offhand fashion at that point saying, you know, "I hope that all of the conversations and whatever you and Kris have done in this case, that you haven't done it out of my offices here in Reno, but you have done it out of Las Vegas, so I don't have to deal with a subpoena coming in here asking for my records and asking for my documents."

I recall there being complete silence in response to that comment.

The next recollection I have regarding that particular brief or the association that I made is about two, maybe three days later.

I received a telephone call from Susan Bayliss, our office administrator from the Las Vegas office.

My secretary and I were the only two people in the office; my secretary was handling a particular matter on the telephone that I had asked her to.

The phone rang and I picked it up, I [46] remember answering "Morris, Brignone and Pickering," and Susan being at the other end, and Susan saying "Pat, why are you answering the phone?"

I said "Tanya is busy, there's nothing wrong with me answering the phone, no problem."

And she kind of hesitated, and she said, "I wanted to let you know and I want you to instruct Tanya of this, we've implemented a new policy here at the firm, that we are going to destroy all telephone records older than two months, and so I want you to have Tanya go back and pull out all of the telephone records that you have, anything to do with the telephone, and make sure she shreds those, and make sure she does that before this evening."

And I have one of most vivid recollections of my blood literally running cold at that point in time, hanging up the phone, sitting there, hands shaking, because my interpretation of that was that I was being now instructed to destroy evidence, because I knew based upon reading of the brief, Steve's conversation with me, that the phone records that I had now been instructed to destroy were likely evidence that was being sought, and that could be sought if there was a special master appointed.

I'm very familiar with the duties of a [47] litigant in preserving evidence, and what the sanctions are associated with if you destroy evidence.

As a matter of fact, one of the cases that establishes that law here within the State of Nevada was a case that

was handled by Kris Pickering which I was involved in.

And I remember just being scared, I remember being angry at the thought that they would put my license in jeopardy, and I remember sitting there until my secretary got off the phone, telling her of the conversation and telling her to gather all of that stuff and to give to me.

I instructed her—I told her as to the conversation that I had with Steve, the order, what I interpreted the instruction that we had gotten from the Las Vegas office to be, and therefore she was supposed to respond back to any inquiries being made by our Las Vegas office that she had complied with their request, even though she had not, and she had gathered all of that information and had given it to me.

Q. All right.

You received the order to destroy records from a Susan Bailiff who is the office manager in Las Vegas.

A. Yes.

[48] Her last name is B-a-y-l-i-s-s.

Q. Spell that again, B-a-y?

A. L-i-s-s.

Q. B-a-y-l-i-s-s. That's the Las Vegas office manager. Your secretary's name?

A. Tanya Yamagata.

Q. Spell it, please?

A. Y-a.

Q. M-a?

A. Yes. T-a-n-y-a.

Q. T-a-n-ya. Last name?

A. Y-a-m-a-g-a-t-a

Tanya later that day informed me that at the end of the day Susan had called her, had passed on that same order, and had impressed upon her the need to comply with that order to make sure that all of that information had been shredded.

Q. When in point in time did you get the order from Susan Bayliss to destroy the order with regard to receiving

the Fax copy of the Whitehead brief requesting the appointment of a special master?

A. After that, and within a two to three to four day timeframe.

Q. All right.

[49] You mention an order. Was that the brief or was there an order that you were referring to? I picked up the word "Order"?

A. No. I'm referring to the brief that had been filed by Whitehead.

The order that I'm referring to is what I received from Susan Bayliss.

Q. Okay.

A. And if you meet Susan Bayliss, and if you have ever dealt with her, you construe her directives, in particular the staff, as orders, and what I understood she to be giving me was, "This is an order, this is an order coming from the firm, this has been a decision that has been made by the partners in the firm."

The partners were Steve Morris, Kris Pickering and Andy Brignone, and this new policy now was to be complied with.

Q. Well, later on in these I was going to get into telephone records, but you have brought them up now.

What happend to the records that you were told to destroy?

A. I kept those.

When I left Morris, Brignone and Pickering [50] I rented a safe deposit box at the bank and I placed those records in the safe deposit box at the bank, and I did so because of my understanding of their importance.

Q. You didn't destroy them, you didn't give them back to somebody else to be destroyed, you kept them.

A. That's right.

And I instructed my secretary very specifically to gather all of the ones that we had at that point in time, because we're now looking at March of 1994—No—March of 1994, that we had accumulated to that point in time,

and then for any records that were generated after that point in time, that she too was supposed to give me those records.

And when we moved my personnal office, so to speak, when I left the firm I instructed her in her gathering of any of those records, was to give anything and everything related to that to me.

Q. Do you recall when you received the order from Susan Bayliss to destroy the records?

I'm referring to date now, not with regard to the time that you received a Fax copy of the Whitehead brief.

A. I don't remember a specific date.

[51] I have a recollection that it was in the month of March, and in the month of March of 1994, but I do have a very vivid recollection of it being after Steve and I discussed the brief, and after that brief had been received that had the attorney general's Fax tag at the top of it.

Q. Did you bring the records which you were ordered to destroy with you to the deposition today pursuant to the subpoena duces tecum?

A. Yes, I did.

Q. Would you produce them, please?

A. I have.

Q. We're getting a little ahead of ourselves here, but I can go back and pick up later.

A. It's up to you.

Q. All right.

A. Do you want me to describe what I brought?

Q. Yes, please.

I was going to say, let the record reflect that you have produced five books at this point. Would you describe those, the documents?

A. What the records that I've brought to the deposition are of, I guess three different types, one type is message books that we kept in our office.

[52] If someone would call in, they would get the secretary, if the attorney or whoever they wanted to speak

with was not available, obviously a message would be kept.

These are kept within the regular course of our business.

They are kept in sequential order, and the phone messages, then, are a carbon copy of the message that was actually given to the attorney or to the other staff member that was receiving the message.

There are five books here. Each one of the books has at the top of it the date, time span in which the books relate, as an example one of the books says, "9/93 through 1/21/94."

What that means from my secretary's standpoint, as I understand it, is that during the period from September 13, 1993 through January 21st of 1994 all messages that were taken over the telephone or of someone walking in are contained in here.

There are five separate books. Each one of them has a date timeframe at the top of it, and each one of them contains, then, the yellow carbon page of the message pad.

Q. Would you initial those books so that you could later identify them, please? I hand you a [53] pen.

A. What I will do is to place on the inside cover of the—Of each book my initials and the date.

Q. Your initials and the date.

A. (The witness complied.)

This is being placed on here in black felt-tip marker.

Q. All right.

Would you in sequential order give those to the reporter, and we'd like this marked as exhibits one, two, three, four, five, and I would like you to mark them as the exhibits, and I would like your initials on those,

(Exhibits 1 through 5 were marked.)

A. For purposes of identification of the exhibits that have been marked to begin with at this deposition, Exhibit 1 is a phone message book that has on its front

cover the dates of February 16th, 1993 through June 23rd, 1993.

February 16th of 1993 is my recollection of the very first day that the Reno office of Morris, Brignone and Pickering opened up.

The Exhibit No. 2 is the phone message book that spans the timeframe from June 24th of 1993 through September 24th of 1993, as is indicated on [54] the front of the page, or the front of the book.

Exhibit No. 3 is the phone message book that spans the timeframe from September 13th, 1993 through January 21st 1993. Once again, it's indicated on the front of the book.

The fourth exhibit is the phone message book for the firm that spans the timeframe from January 21st, 1994 through April 21st, 1994.

The last phone message book is for—I'll explain the last few dates on here in just a second—but it is a phone message book that spans the timeframe from April 21st, 1994 through June June 27th, 1994.

June 17th of 1994 was mine and my secretary's last day at Morris, Brignone and Pickering.

I know that we continued with this message book until it got full for the continuing work that I was doing at my—At Mc Donald, Carano, and so there are ten days that are contained within this message book that I believe I was over at Mc Donald, Carano, and I know there was a few days overlap where I was trying to finish up some old projects at Morris, Brignone before being full time at Mc Donald, Carano.

Q. Are there any gaps in days there? Are those the entire phone record books?

[55] Or is there one or more books missing? It sounds as, you were going through it, it sounded like they were completely sequentially without any gaps.

A. That's correct.

The phone message books that I have brought to this deposition are the phone message books that span the timeframe from the day that I walked into Morris, Brig-

none or the day we opened up the Reno office of Morris, Brignone and Pickering to the day that I left the Reno office of Morris, Brignone and Pickering, and constitute all of the messages that were taken during that period of time.

The second set of documents are phone bills. These phone bills run . . .

Q. Are they original phone bills or are they copies?

A. They are in stack number one, these are copies, and for this reason. These phone bills were sent to the Reno office of Morris, Brignone for Tanya, my secretary, to reconcile and to assign a billing number to, and that way we could bill the client for the long distance phone charges, and when—The way I understand her procedure to have been is that once she reconciled these phone bills, assigned the billing information to them, she sent the originals, then, back [56] to the Las Vegas office for payment and she kept copies of what she sent to the Las Vegas office for payment.

Q. Do you know who made the copies?

A. I believe that my secretary made the copies.

Q. From the originals?

A. From the originals, or it could have been someone in the Las Vegas office making the copy, sending it to Tanya, my secretary, to reconcile, and then for Tanya to take that particular document and to send back to Las Vegas and for her to keep a copy then of what she sent back to Las Vegas.

Q. So these are either copies of the originals or copies of copies of the originals? Do I understand you correctly?

A. Yes.

These were also kept within the normal course of our business, and there is—I have attempted to determine whether or not these constitute all of our phone records for the entire time that I was at Morris, Brignone and Pickering.

I believe there is one gap. The gap is for the period of time that would be the last few days in September of

1993 and for a portion of the month of [57] October, 1993, and there is an explanation.

Q. Why the gap?

A. When I look at the Fax activity reports that our office generated, there's also a gap in those Fax activity reports for the same period of time.

My secretary has got a note in here to the Las Vegas office that says "Once again someone has taken the Fax activity report for this period of time and I'm only—I have to go back and try to recreate the Fax activity for a certain period of time."

The few Fax activity reports that are missing also correspond to the timeframe that is missing for the telephone bills.

Q. And what are the dates of the missing Fax reports and phone bills?

A. The missing phone bill, like I said, runs the last few days in September of 1993 and a portion of the month of October, 1993.

The missing Fax activity report also relate to the end of September, 1993, and for a portion of the month of October of 1993.

And let me explain the difference, then, between these two sets of documents. One is the telephone bills.

The others are the Fax activity reports, [58] in other words, our Fax machine, once we got a particular Fax machine was able to run out on I believe a weekly basis or whatever basis, whatever timeframe you wanted it to run out on, all of the activity that was generated off that machine, all of the incoming faxes as well as the outgoing faxes.

It collected within its memory that activity, and my secretary was able to program that machine to give you an activity report, and that was for billing purposes.

As an example, on the very first page of the set of documents it indicates that there was a Fax that was sent to a particu r Fax number, and then my secretary has in the margin th file number of which that expense should be

billed, and we ran these Fax activity reports for billing purposes to the clients.

Q. It there a way to determine from these reports to whom they were sent or from whom they were received? Or is there only Fax numbers that appear?

A. The activity report itself was sent to Las Vegas for billing purposes.

The individual faxes that were received and sent, it can be determined as to who it was sent by and who it was sent to.

[59] Obviously, it was sent to the Reno office of Morris, Brignone and Pickering, but as to its origin, yes, you can make a determination as to its origin.

It has the telephone number connection and many times the connection identification as to where its origin was. The handwritten marginalia on the far right-hand side is my secretary's handwriting where she made indications as to the billing information, in other words, which file that particular expense should be billed to.

Q. All right. Educate me, please.

There is on the extreme left column, it looks like an activity number?

A. Yes.

Q. An abbreviation?

A. Yes.

Q. What does that mean? What is the significance of activity number?

A. You're talking to someone that is not entirely computer literate, so this is a little bit . . .

Q. You're talking to somebody who is computer illiterate.

A. It may be a little bit like the blind [60] leading the blind.

But as I understand the activity number, it is a sequential number that says, like 2495 was the—One piece of paper that was faxed to our office and that it was the 2495th Fax that had ever been received by our office, and if you look at the next one down below it says 2496. I believe that has the same type of an indication.

Reading across the page where it says, "Mode," I don't know what that means, my secretary probably does.

When it says "Connection tel," I believe that that is the origin of the Fax.

Q. The telephone number or the Fax—The telephone number of the Fax machine sending the document?

A. Sending the document, yes.

Q. All right.

A. And then where it says "Connection I D," that is the identification that is assigned then to that particular connection telephone number.

Like I recall 474-4547 was Steve Morris's personal Fax machine, and so where it says "Steve Morris" at the top was the I D or the identification for that particular telephone number.

[61] As a further example, at the very top of of the page you see "M B P Reno," that is the abbreviation, or that is the connection I D that we assign to our Fax telephone number, and our Fax number, then, was 322-7791 and its I D was M B P, Reno.

Q. Start time is when the Fax machine started up; is that correct?

A. Yes.

It says "Start time," and then it has a date 6/13, and that would have been in 1994 and 1554, military time, so we're looking at about 3:54 that Fax came in, and it had usage time then of—looks like about forty seconds, one page, and the result in the far right-hand column then says, "Okay," which means that the transmission, there was no problem with the transmission.

Q. And N G? No good?

A. May be. That I don't know the answer to.

Q. All right.

Let's go off the record for just a moment.

(Discussion off the record.)

(The noon recess was taken.)

[62] RENO, NEVADA

SATURDAY, SEPTEMBER 2, 1995, 1:00 P.M.
AFTERNOON SESSION

(Exhibits 6 through 17 were marked.)

MR. AHLSWEDE: Let's try to fresh my memory where we were. Pat gave us some documents.

Would you read back the last couple of questions?

(The record was read by the reporter As follows:

"QUESTION: And N G? No good?")

BY MR. AHLSWEDE:

Q. Back on the record.

Ms. Lundvall, you produced some documents pursuant to a subpoena. The documents have been marked, and did you bring any other documents?

A. Yes.

There was another set of documents. These documents are the telephone long distance phone charges that we received from the phone company. They span the timeframe from March of 1993 through June of 1994.

Each one of these documents bears my initial and they have been fixed with a Bates label [63] that is numbered one through 165, and they have been identified as, Exhibit No. 6 to this deposition.

Exhibit No. 7 is another set of phone and Fax activity reports that span the timeframe from—It looks like about April of 1993 through June of 1994.

Each one of these documents has my initials at the bottom, and it is within a packet that has Bates labels fixed to it bearing the numbers of 166 through 259, and that packet has been marked as Exhibit 7 to this deposition.

The next set of documents are handwritten notes, in particular the majority of which are Steve's notes with some of my own as to telephone calls that were made and to which clients those phone calls should be billed to.

They have been clipped together or stapled together marked as Exhibit No. 8.

Each one of these has my initial at the bottom and they bear the Bates labels of 260 through 269.

Next is a single sheet identified as Exhibit No. 9 bearing the Bates label of 270 with my initials at the bottom, and these are—This is Andy Brignone's handwriting, and this is his notes concerning telephone calls that he made on a particular [64] day when he was in the Reno office of Morris, Brignone and Pickering.

Exhibit No. 10 is a group of documents that have been clipped together. They bear an exhibit sticker of number ten. They have my initials on each one of them and they are Bates labels 271 through 274.

Once again these are handwritten notes of various individuals with Morris, Brignone and Pickering, their telephone calls that they placed and to which client those phone calls should be billed to.

The next handwritten note is labeled Exhibit 1. It is a legal sized document that—

Q. Pardon me. Did you say Exhibit 1?

A. Excuse me. Exhibit 11.

It was a single sheet document that has my initials at the bottom of it and bears the Bates label of 275, and I think that this is Nikki Laxalt's handwriting.

Once again these are just notes for the secretary to know what file to bill the long distance phone calls.

All of theese handwritten notes that are on Exhibit 8, 9, 10, 11, 12 and 13 are simply notes that the individual attorneys kept at the offices of Morris, Brignone and Pickering.

[65] They were given then to staff to bill to clients for the long distance phone charges that were reflected in those phone calls.

Going in my description of the documents, Exhibit 12 is a single sheet document that bears the Bates label of 276. It has my initials at the bottom of the page and the

handwriting, then, is on that page. It looks like Steve Morris's.

Next is Exhibit No. 13, it bears Bates labels of 277 through 289. It has my initials on each one of these pages, and once again these are various notes, handwritten and typed, that are for billing purposes so that the staff can make a determination as to who to bill the charge to.

And in this compendium of documents there are two individual phone messages, one of which was received on March 22nd, 1994 to the initials, S M means Steve Morris, the phone message was from Don Campbell a phone number of 382-5222, and that call my secretary indicates came in at 9:45 in the morning.

There's also Steve's handwritten notes in the bottom portion of that message where it indicates, "Return call at 12:15 p.m.," and then there's a client, what appears to be a client identification.

There's also a second phone message note [66] here, once again to Steve Morris on March 22nd, 1994 at 8:15 in the morning. Walt Stowe called from 366-7102 and then Steve's handwritten note at the bottom that says he returned the call at 1205, and it's a firm expense and there's also a fax number on here 383-3519.

Q. Now, would that indicate that there was a Fax sent with that phone call or in conjunction therewith?

A. That is quite possible, either a Fax that was sent or that was going to be sent to that number.

I would—Based upon Steve's habits, this message to me would indicate that he had sent a Fax to this number and that he was giving a message to my secretary that she should bill that Fax charge to the firm expense once again.

On a few of these phone messages that you will see in the phone message pad, you'll see a notation that says, "A N S machine."

What that is is my secretary's notation that on our answering machine, that this person would have called and left a message.

Our offices did not—Not officially—But usually no one was in our offices for business until 8:30 in the morning, and therefore anyone calling at 8:15 likely would have gotten our answering machine [67] at the offices.

Now, our answering machine was a standard answering machine.

It recorded messages and then once you took that message off there it started back up at the front end then of the tape. And no messages then were recorded on top of each other.

Q. You mentioned that the name appearing on that was Walt Stowe?

A. Yes.

Q. Are you familiar with a Walt Stowe?

A. Yes.

Q. Who is Walt Stowe?

A. I was introduced ot Walt Stowe in September—Or excuse me—In the spring of 1993.

Walt Stowe, I was informed, was the head of the Federal Bureau of Investigation located in Las Vegas.

He had relocated from New Jersey and was now heading up the FBI down there.

Q. To your knowledge did the firm have any business with—Any legitimate business with Walt Stowe as a client or as a witness?

A. The firm to my understanding never represented Walt Stowe individually or the FBI as an [68] entity, and I did not know of Walt Stowe being a witness or a participant or having any dealings with any of our regular firm activities.

Q. All right.

We'll get back to Walt later, but go ahead.

A. And the last exhibit that was marked is Exhibit 14, which is simply—This was a document that was found within the rest of our telephone documents.

It was a message that my secretary prepared and sent to Gina, who was Kris's secretary in Las Vegas, and it speaks to issues about trying to reconcile, then, the telephone logs as well as the Fax logs.

That's a single sheet document marked Exhibit 14, bears the Bates label of 299, has my initials at the lower left-hand corner.

Exhibit 15 and Exhibit 16 are two memorandums, these memorandums each of which have my initials in the lower left-hand side portion of the page.

Exhibit 15 bears the Bates label of 291 through 294, and Exhibit 16 bears the Bates labels of 295 through 309, and once again my initials are on the bottom portion of the page.

[69] Exhibit 15 is a memorandum dated April 28, 1994.

Exhibit 16 is one dated April 22nd, 1994.

And the last exhibit that has now been marked as Exhibit 17, Exhibit 17 bears the Bates labels of 310 through 318. Once again it has my initials in the lower left-hand page.

Exhibit 17 is photocopies of articles that my secretary had photocopied after doing research for Kris and Steve in the Washoe County archives and each one of these articles deals with judicial discipline, judges, judicial elections and things of that nature, and there's a memorandum from my secretary to Kris that talks about her gathering these articles for Steve.

Exhibit 17 was contained in some boxes of papers that my secretary had among her files, and Exhibit 15 and Exhibit 16 are memorandums that were found within my chron file. Well, which basically was the firm's chron file for the Reno office, and these documents were discovered when we moved over to Mc Donald, Carano.

The Exhibit 17 was given to me by me secretary just with, "Pat, I have this, what should I do with this information?"

Q. Thoes are all of the documents that you [70] brought?

A. Yes, they are.

Q. All right.

Some time ago I asked you about whether you knew if the firm or any attorney there had obtained copies of

documents that were filed with the Supreme Court during the pendency of the Whitehead case.

You mentioned there was one document, a brief of Whitehead's attorneys asking that a special master be appointed.

Were there any other documents that you were aware of that the firm obtained during the Whitehead investigation?

A. I was aware that there were other documents that the firm had obtained.

My knowledge and awareness on this is very general.

The knowledge and awareness is general knowledge as to what was going on in the Reno office during a period of time from, you know, February through—I guess about January through when I left in June, then, of 1994.

I always felt responsible for that office and what went on that in that office, and to the extent that I knew of activities in general that were going [71] on, that I did.

The documents that I'm aware that the firm had obtained other than the brief that was filed by Judge Whitehead's attorneys were documents that were in Nikki Laxalt's office for purposes of research projects that I was aware that she was working on at that point in time.

These documents were in large expandos, multiple numbers of those expandos, and they sat on the floor in her office and as you walked by the office you could see the expandos, and sometimes you could see the contents and what the expandos were, and on occasion I looked at what was in there.

Q. And what did you determine was in those files?

A. There were copies of newspaper articles, there were copies of briefs, there were copies of letters.

The newspaper articles, the briefs and the letters, all of which dealt with the Judge Whitehead matter.

The specifics of what the briefs were of, what the letters were, what other evidentiary materials may have been contained in there, I don't have a recollection because I didn't look at it that [72] close.

It was not a project with which I was involved, and it was a project that at a very decided point in time I took a certain effort to avoid having any knowledge about it.

Q. Do you know the source of these documents, how they came to be in your office?

A. They came—They were in the possession of Nikki Laxalt.

Nikki Laxalt was working on various Whitehead research projects. Where she obtained them I don't know. I never asked.

Q. And therefore you don't know the source or how the documents were obtained?

A. No, I don't.

Q. Other than that one dealing with the appointment of a special master?

A. That's right.

And that's the conversation I related to you earlier with Steve.

Q. Do you know whether either Morris or Pickering were indicated with anybody in the Las Vegas Review Journal concerning the Whitehead case?

A. I was never a party to a telephone conversation, at which time that I knew that they [73] were.

A review of the telephone message books will demonstrate that there are numerous messages to Steve, and I believe to Kris, but most particularly Steve from A D Hopkins, and I understand A D Hopkins to be associated with the Las Vegas Review Journal.

Q. Do you know the subject of these communications?

A. There are some notes contained within the messages. One note sticks in my mind, it says, in the "Re" line, the r-e line, that says "Gag order of Supreme Court."

Also I think if you take a look at the telephone calls being placed to the Las Vegas area, I believe there are a certain number of telephone calls that were being placed from the Reno office at Morris, Brignone and

Pickering to Las Vagas, and I understand some of those calls to be placed to phone numbers that are connected with the Las Vegas Review Journal.

Q. Do you happen to know those numbers?

A. Off the top of my head, no. What I'd have to do is go back and look and piece together many of the documents.

Much of that activity I have not done. I have only done that in general.

[74] Q. Do you know whether either Morris or Pickering submitted confidential documents to anyone at the Review Journal concerning the Wihtehead case?

A. I know there are a number of transmissions, Fax transmissions, I believe to the Las Vegas Review Journal or phone numbers associated with the Review Journal, but do I have any more knowledge than that concerning direct communications? No, I don't.

Q. We may have touched on this before, but I will ask again: Do you know what motivated Morris and Pickering to violate the Supreme Court confidentiality order if in fact they did regarding the Whitehead case? Why they were seeking the adverse publicity of Whitehead?

A. I believe that any animosity that they bore concerning this matter was directed at members of the Nevada Supreme Court, and that there may have been an interest in attempting to control who sat on the Supreme Court in an effort to try to permit them an advantage, if one could be had, in deciding, having difficult decisions decided by the Nevada Supreme Court.

Q. In summary, do you believe that at least one of the objects of their involvement in the [75] Whitehead case was to ultimately gain a controlling advantage of members of the Supreme Court by disparaging the present members, possibly getting them replaced or something of that order?

A. That would be my opinion.

Q. Upon what do you base that opinion?

A. Years of working with Kris, and working directly with her on many, many appellate projects, listening to her complaint about certain members of the court, how certain members of the court, she believed, could be bought off, that had been bought off by her adversaries and that had ruled against she and Steve, and on particular cases, in particular the cases that they were really, really interested in their resolution and had invested large amounts of effort into deciding those cases.

It's very difficult to articulate, I guess, the entire basis for one's opinion when you have worked with someone for a long period of time.

The length of time that I worked with her, the number of conversations that she and I had over the members of the Supreme Court, the animosity that I knew that Steve bore toward former Justice Gunderson because of the opinion that he had wrote that discharged Steve and Kris's adoption of that animosity towards Justice [76] Gunderson, conversations that happened at Lionel, Sawyer when I was there, when I heard her, you know, yell at other attorneys when it was found out that they went to Justice Gunderson's retirement party.

You know, the whole number I guess of little incidents, each one possibly minor in their individual significance, but cumulatively, they have lead me to the belief that I shared.

Q. I believe we discussed earlier but I will ask again, what particularly judges may have been the target of their attempts to control the court?

A. Justice Springer in particular, and the animosity towards Justice Springer I was aware of almost from the day I began working with Kris, in the belief that he was far too liberal in his opinions and far too—In his decisions that had been handed down against business interests and business clients, and then toward the end, at least based upon conversations that I had with Nikki Laxalt, is that I got the opinion or I go the belief that

Justice Steffen was a potential target, was—And their concern there was there was somehow a friendship or kinship between Justice Steffen and Judge Whitehead, and because of that friendship or kinship that they believe may have existed that he was then going to be a target, and I [77] also I believe it was Justice Steffen who had —Or was one of the signatories to the original confidentiality order, that he then became a potential target for lack of a better word of any efforts by them.

Q. Do you know whether either Morris or Pickering were the first to provide information on the Whitehead case to the Review Journal?

A. I have no direct knoweldge concerning that.

Q. Other than A D Hopkins, do you know whether either Morris or Pickerting either talked to or communicated with anyone else at the Review Journal?

A. I don't know that, because I don't know all of the members of the Review Journal or all of the people that—Or all of the reporters that may have reported on this particular issue.

All I know is that A D Hopkins or his name has come up in frequent newspapers articles and his name appears in like footnotes of opinions or things of that nature.

And I know that in the phone message pads that there are messages to Steve before the Review Journal articles, which I understand ran in the front part of October of '93, so there's a number of phone messages to him during that period of time from A D [78] Hopkins, and there are a number of phone message pads—Or phone messages to Steve from A D Hopkins immediately thereafter.

Q. Do you know how either Morris or Pickering were able to obtain the cooperation of the Review Journal in violating the confidentiality orders?

A. It would be pure speculation on my part.

Evan Wallick is an attorney associated with Lionel, Sawyer and Collins.

Evan Wallick has been a long, long time attorney for the Review Journal.

Evan Wallick was someone who Kris and Steve were partners with for a great number of years, and I remember a conversation that I had with Steve.

He and I were in his car on our way to an evening with the judges that was being held in Las Vegas, and this was almost right after we had opened up—Right after Morris, Brignone and Pickering started.

This would have been sometime, sometime I would assume in the March or April of 1993 timeframe, and Steve talked about his influence with the newspaper.

He was trying to get a case at that point [79] in time that dealt with the newspaper, his contact with the newspaper and how he had been able to curry favor with individuals with the newspaper in the reporting favorably on some of his cases.

There was also a conversation that I had with Kris Pickering after the Review Journal had reported favorably on a matter that Steve was handling, and Steve—And Kris had made the comment to me how Steve's efforts and becoming friendly with individuals with the newspaper were paying off for the firm and the we were getting favorably press coverage then for the firm for matters that Steve was handling.

Q. Other than contacting the Review Journal, did either Morris or Pickering engage in any other measures to cast the Whitehead case and any judges associated with that case in a bad light, to your knowledge?

A. In addition to the Review Journal I know that there are phone messages from Steve Timko who I understand is a writer with the Reno Gazette-Journal, and one of Mr. Timko's messages makes reference to the gag order of the Supreme Court, and so if you make the assumption that there was discussions with Mr. Timko and if that phone call was returned, then I recall the review—The Reno Gazette-Journal reporting, you [80] know, unfavorably on Judge Whitehead and suggesting that the Nevada Supreme Court had overstepped its bounds in establishing a confidentiality order in the first instance.

Q. Do you know whether Morris and Pickering had any undue research regarding the Whitehead case other than the contract attorney, Nikki, doing—researching some of the aspects of the case?

A. I know that Nikki, we spent a great deal of time performing legal research on issues that were related to the Whitehead matter.

There was another attorney in our Las Vegas office. His name was Jose Leon. Jose Leon, one of the nicest gentlemen you will ever meet. He once informed me that he was doing a lot of work on the matter and began to share what he was doing with me, and I remember saying, "Jose, I don't want to know, you know, about any of this. I don't want to know anything," but he made the preface comment to me that he was working on that.

And I believe Jose told me, I'm pretty sure it was Jose that told me that Mark Hutchinson also in the Las Vegas office was doing research into the—On various issues related to the Whitehead matter.

Q. Do you know what the purpose of all of [81] this cumulative research was?

A. That I do not know. I was at that point in time where I definitely began to distance myself from these people, and this project in particular.

Q. Do you know whether either Morris or Pickering ever contacted any out-of-state ethitists concerning the Wihtehead case?

A. There are a number of phone messages from Geoffrey Hazard, who used to be with Young University, I think he's now with the University of Pennsylvania, Geoffrey Hazard is one of the most renowned legal ethitists, and there are a number of messages from him to Steve and to Kris, and I believe that there's a number of return forms to him as well that appear on the phone logs.

Q. Do you know anybody else besides Professor Hazard?

A. Other legal ethitists.

Q. Other legal ethitists, yes.

A. I don't know because I guess that would assume that I know all of the legal ethitists out there, and that I don't.

Q. Okay.

A. There are a number of people that appear on the phone message pads that I don't know the [82] identity of.

Q. Do you know why they contacted the legal ethitists?

A. I don't know.

Q. Do you know if they paid the ethitists for their opinions, or were they given gratis?

A. I don't know the answer to that either.

The other individual of note that I see that is placing a number of phone calls to them at this point in time is a gentleman by the name of Al Kaplin.

Al Kaplin I know to be a private investigator. I've never met Kaplin, or I don't believe I've met him.

I've been informed of Al Kaplin, of his expertise and the quality of his expertise.

Q. In what context did the name Al Kaplin come up and how did you meet him?

A. Al Kaplin I know to be a private investigator that works out of Las Vegas.

He has worked matters for Kris and Steve for a number of years, and I think that his involvement with them dates back to a case that involved the MGM fire.

And Al Kaplin, I had been informed on repeated occasions was absolutely phenomenal at his [83] private investigative skills.

They once—Kris once—Or maybe it was Steve once related this story to me, that one evening he got a call from Al Kaplin.

Al Kaplin was in the offices of either the adverse party or the adverse attorney handling the case and was sitting at his computer terminal and was wanting to know what

information Steve wanted downloaded from that terminal. That's how good Al Kaplin was.

I was also informed that Al Kaplin was very, very expensive, and that you only retained Al Kaplin for any of your files unless you had a real high dollar or high sensitivity issue concerning that because he was very expensive, but he was the best in the business.

And there are a number of messages around the same time as the legal ethitists placing messages the same time that A D Hopkins with the Review Journal is placing messages, at the same time that Steve Timko is placing messages, and at the same time there are a number of messages from Justice Rose's office.

Al Kaplin is also placing telephone calls in that same period of time.

[84] Q. Do you know whether the firm ever received opinions from the legal ethitists?

A. That I don't know.

Q. Do you know or do you have any reason to believe that any portions of the opinions of the Nevada Supreme Court were written by or initiated by members of the firm and then later transmitted to the—To a member of the Supreme Court?

A. The answer I give is an opinion. That opinion is based upon years of working with Kris and Steve, with Kris in particular, knowing their writing style, knowing their grammar, knowing their syntax, knowing particular words that they use.

In reading—And I don't keep track of what numbers any of the Whitehead opinions, dissents or concurrences have—In reading two of the dissents that are purportedly Justice Shearing's, there are certain things that cause me to believe that Kris may have had a hand in drafting one of them, and that the other may have been drafted jointly between Kris and Steve, but specific or direct knowledge as to that question, I don't have that, no.

Q. All right.

I hand you what is labeled "Petition for Writ of Prohibition" filed in the Supreme Court, it's [85] 100 Advanced Opinion 48.

Look at—Would you look at page 45, which contains the dissenting opinion of Judge Shearing and see if you see anything in that opinion that would cause you to believe it was written by either Kris or Steve?

A. Now, if this is the—I think what they call this is Whitehead One or something, there's nothing within this, you know, one page dissent that—

Q. What is the date of that?

A. The date of this one is April 22nd, 1994.

Q. All right.

This other one is Whitehead One, I believe, and that is referred ot as 110 Nevada Advanced Opinion 18?

A. There's nothing in this short one paragraph of dissent that was filed by Justice Shearing that leads me to believe in this—In that particular opinion that it was drafted by Kris or Steve, no.

Q. All right.

110 Advanced Opinion 18 is Whitehead One.

110 Advanced Opinion 48 is Whitehead Two, that's the one that I think you previously referred to as Whitehead One, so I think you have looked at that.

A. Yes, and nothing contained within [86] Whitehead Two, this is just a very short, about a one page and a paragraph dissent that leads may to believe that it was drafted by Kris or Steve.

The other opinions to which I was referring are ones that are much lengthier, and I believe that one of them was not even an official opinion, but she retracted it or something like that, or revised it prior to its publication.

Q. All right.

Now, referring to Advance Opinion 10, Nevada Advanced Opinion 107, which is Whitehead Three, I believe there was an order, an unpublished order that came out at another time, but here commencing on page 32 is a Shearing dissent, it goes from page 32 to 53. Could you

briefly review that and scan it and see if anything there strikes you as being written by either Pickering or Morris?

A. Without reviewing this in its entirety and, you know, taking it apart piece by piece, I don't believe this is the particular decision that I was referring to earlier as being authored or potentially being authored by someone other than Justice Shearing.

There was a dissent in particular that I recall that dealt with the—That dealt a lot in great [87] detail with the confidentiality order and the legality of that order, and whether or not the Nevada Supreme Court had the power to impose such an order, and I don't see that this particular dissent is the one that deals with that issue.

Q. All right.

I'm now giving you 111 Nevada Advanced Opinion 11, that was written this year, February the 24th, Judge Shearing's dissent appears on page 14 and goes through page 196.

I know that's a lot to scan in just a few moments, but could you look through that?

A. Now, in the very brief period of time, once again, I don't believe that this is the particular dissent to which I'm referring, and if this is an opinion that is referred to as Whitehead Four, I believe there is a Whitehead, what they call foud and a half, another decision that was handed down, and to which there was an unofficial order that I read the dissent, and in that unofficial order when I read the dissent, it to me spoke very clearly to me that the author was someone I had worked with before.

Q. All right.

That must have been the unpublished order?

A. The unpublished order.

[88] Q. And that comes somewhere between—I think between two and three or three and four?

A. And the published order, then, was later modified, and in that modified dissent, in reading that modified dissent from the unpublished order that I said once again to myself, "I've worked with this author before."

The first author that I felt that I had worked with was Kris.

The second author that I felt that I had worked with was both Kris and Steve.

In other words, it gave me the feeling in reading that dissent or at least certain portions of that dissent that that was Kris's handiwork.

She's a very articulate writer and there were also portions of that work that led me to believe that maybe Nikki Laxalt had helped her in the drafting, or that there was part of Nikki's handiwork that was also contained in the unpublished order. That unpublished order as I recall was significantly modified, then, into the published opinion.

Q. Do you know if any person assisted Pickering or Morris in doing legal research for—On the Whitehead case other than Nikki Laxalt, that is, writing briefs or opinion letters or something that [89] they would later incorporate in their brief?

A. Nikki Laxalt was the one attorney that I knew that was working on the project. Jose Leon informed me that he was working on the project, and I believe that it was Jose that told me that Mark Hutchinson was also working on the project.

Q. And they were doing the legal research, would they have fed that research to Kris and possibly for use in writing an opinion or part of an opinion for the Supreme Court?

A. If they were involved in that drafting activity I would assume it would have been similar to how I as an attorney was used by Kris and Steve.

What I would do, I would be assigned even discreet research projects and be asked to exhaustively explore case law and come up ideas, methods or approach and analysis, and to draft memorandums and to submit those memorandums to them.

They also would be involved in the project in that they would be researching other discreet areas.

And quite frequently when we had more than one attorney involved in a big research project for a big drafting, drafting a big paper or brief or something of that nature, the end product would [90] be an amalgamation of many attorneys' research.

It would be edited and edited heavily by Kris, and then Kris and Steve would also then work on it and Steve has certain stylistic ways of writing and editing.

Kris has certain stylistic ways of writing and editing, and that stylistic ways of writing and editing are what formed my opinion that when I read the unpublished order of Justice Shearing, and then the published opinion of Justice Shearing in Whitehead four and a half, that some of those stylistic things were there.

It was a little eerie.

Q. All right.

A. Also, if my recollection serves me, in one of these memorandums, I believe that it is Exhibit 16, there are a number of quotations that appear within the memorandum.

Those quotations are from cases, and I think that many of these quotations appear in the unpublished order, and I think in the published opinion, and not only do the quotations appear, but I think they appear in the same order in Justice Shearing's work as they do in the memorandum working.

[91] When I look at that and also look, like I said, the certain stylistic methods of writing and editing that Kris and Steve had, that formed the foundation for my belief that I had read that author's work before.

Q. Now, do you know whether Steve or Kris were the focal or rallying points to efforts to create adverse publicity?

That is, did they try to influence others to get on the bandwagon, so to speak?

And I'm referring now to people outside the firm, were they—Did they try to influence other people outside the firm, if you know, to—

A. That I don't know, and I'm trying to recall who if they ever, you know, specifically did that with me either.

I remember general comments, you know, disparaging comments, you know that they had made to me, but I don't remember them like recruiting me to do any of that kind of work, no.

Q. Do you know if they met with other individuals regarding the Whitehead case outside the firm?

A. I know that there was one meeting with Justice Rose that took place in the offices of the [92] firm, in the Reno office of the firm.

I remember it being sometime in October, mid-October, it was after we had finished with a particular trial that we were working on.

I remember having worked that weekend and Steve still being up in the Reno office and asking me if I was working the weekend and if I anticipated being in the office across the course of the weekend.

And I told him repeatedly yes, and he dropped a number of hints that he did not want me there in the office and that I should work in the library.

Frankly, it irritated me, and that I made a comment and expressed that irritation, I know to my secretary, "Evidently Steve has something big that was going on," or he wanted to use the office and he wanted absolute privacy because he didn't want me there, he made that real clear.

And she said "Oh, yes, he's got Justice Rose coming over for a meeting."

Q. Was this when—I think Rose initially sat on the Whitehead case and then recused himself.

Was this during a period of time when Rose was on the case or after he had recused himself?

A. It would depend upon when he recused himself. [93] I remember when the meeting was held, but I don't know when Justice Rose recused himself from the matter.

Q. All right.

You remember when this meeting with Justice Rose occurred, and that you said was in October?

A. October, I remember it being mid-October.

Q. Of what year?

A. 1993, and I remember it being after we had finished with the Seeno trial, the case that we had been in trial with for about five weeks, and so it was like—It would have been the 2nd or 3rd weekend into the month of October of 1993.

Q. All right.

A. I remember coming into the office real early that Saturday morning, getting a bunch of materials, gathering them up and going down to the Washoe County Law Library and then working for the balance of the day.

Q. All right.

At that time did you have—Within the office—A shredder?

A. Yes, we did.

As a matter of fact, we had two shredders [94] in the office.

We had rented two—We bought one and we rented another one, for our one attorney office, full time attorney office, anyway.

Q. And when you went to work in the library the day that Justice Rose came to visit Steve Morris, did you happen to look at the contents of the shredder?

A. Yes, I did.

Q. And what did you notice?

A. I noticed that the trashcan that sat below the shredder was empty, and our cleaning people came on Friday, and so there—

Q. Would that be Friday after hours?

A. Friday after hours, and so whatever we had done on Friday during the workday, then all of the trash cans, everything like that were all cleaned then, so Saturday morning you had a fresh office.

Q. So Saturday morning the trash cans under the shredder were clean?

A. Uh-huh, yes.

Q. Did you return to the office that afternoon or evening?

A. Yes, I did.

Q. Was anyone in the office?

[95] A. No, nobody was in the office. There were a couple of coffee cups in the sink, and the sink—Like I said, a small kitchenette sat—The sink was right in front of where the shredder and trashcan sat, and I noticed a single sheet.

Q. Did you have occasion to look at the trash cans under the shredder when you returned?

A. Yes, I did.

Q. And what did you see?

A. There had been a single sheet of yellow paper that had writing on it that had went through the shredder, and sometimes curiosity kills the cat. I remember trying to pull those pieces out of the trashcan to piece them together to see if I couldn't see the contents of what had been shredded, because I find it curious that there was something in there, but I couldn't piece it together to figure out what it was.

The only thing that I could piece together that I could see is you could see an R O S on one of the strips, and an M T G on another one or the strips.

Q. An R O S on one strip and M T G on the other. Did the shredder shred laterally or horizontally?

[96] A. Predominantly—Well, wait a minute—

Q. If it was eight and an half by eleven, would the R S E be running across or would it be running down?

A. It would be running across, and the piece of paper then would have went into the shredder the long way, and so the individual strips would have been carved then vertically, not horizontally.

Q. So if the paper were put back together, the R—Was it R S E or R O S?

A. I remember R O S.

Q. R O S E? Or just R O S?

A. R O S.

Q. Would it have been written across the paper as you would normally write on a yellow sheet?

A. Yes.

Q. Rather than an R and an O and an S going down the long way?

A. No, this was an R, an O and an S, and then there was a cut mark, so whatever fell after the S and whatever fell before the R where the cut marks that the shredder had made onto the strip.

Q. How wide were the strips?

A. Half the width of my little finger, which [97] is maybe 2/8ths of an inch, 3/8th of an inch.

Q. Was the R O S on one single strip or were the strips put together to make the R O S?

A. No, that was on a single strip, and it was printing and I recognized the printing as being Steve's printing.

Q. Okay.

Let's go off the record.

(Discussion off the record.)

BY MR. AHLSWEDE:

Q. Back on the record.

You said there was a yellow piece of paper that had been shredded, did you notice anything else that had been shredded?

A. No.

Q. Did the trashcan under the shredder contain only one piece of yellow paper, or was there more in the shredder?

A. Just one piece of yellow paper, and the yellow paper, it was, you know, in such contrast to the black of the trashcan, that's why it like really stuck out.

Q. You said there were two shredders in the office. I assume both sitting atop of different trash cans?

[98] A. Yes.

We had one shredder up front that was directly in front of the sink and it was like if you were having coffee or putting something in the sink it was right there.

We had another shredder in the back of the office that was much harder to run, but it was a cross-shredder that during the course of the Seeno trial we had leased that cross shredder, and I believe that was still there in the office so that we had two of them for about a two month period of time, but the one shredder that was up front that we used on a regular basis, that was the most easily accessible shredder that we had in the office, and it was right there easily in plain view and easy to operate.

Q. Did you observe the other shredder when you returned from the library?

A. That I did not.

Q. So in summary, it was just one shredder that you looked at and that one shredder had one piece of yellow paper?

A. Yes.

Q. Do you recall whether you read any articles in the Review Journal regarding the Whitehead case before confidentiality was lifted?

[99] A. My understanding of when confidentiality was lifted was when Judge Whitehead waived his right of confidentiality and gave a long interview to someone with the Reno Gazette-Journal.

Q. Yes.

A. That—And yes, there was a lot of newspaper articles, then, that preceded that, and, yes, I would imagine most anyone else in the legal community, a very decided interest.

Q. Did either Morris or Pickering discuss any of the articles with you, these articles that preceded Whitehead's waiver of confidentiality?

A. I have a general recollection of discussing with Steve a frustration with the Gazette-Journal and their cursory coverage of that, and how in depth and more pointed the articles were in the Las Vegas Review Journal.

I remember him expressing a frustration that he believed that somehow Whitehead controlled the Gazette-Journal, and that's why he was getting more favorable

treatment on the north end of the state in contrast to the south end of the state.

But that is a very general recollection of that.

At this point in time, and we're talking [100] after the Seeno trial, there was very tense feelings because of the result in that case, because of a number of different incidents that happened during the course of that case that Kris and I were not speaking to each other.

And so it was about—Actually, about September forward that the amount of communication that she and I had was real hit and miss.

And so more of my communications, then, regarding any issue related to the firm or any other legal issue was more with Steve than it was with Kris.

Q. Did Steve at any time indicate his displeasure with these articles by saying—By indicating in any way that he had furnished the information or in some way authored these articles?

I'm not trying to put words in your mouth, but as an example, did he say or words to the import, you know, "Darn it, I told them more than that and they really botched up what I told them"? Or something like that? That's what I'm getting at.

Did he ever make any such comments?

A. No.

And that is not like Steve. Steve would not have said something like that to me, in particular [101] given the attention given his wife and myself after that trial.

Q. Well, at any time, did he express displeasure and express his displeasure in words in which he would have impliedly admitted some part of the authorship?

A. I don't have a recollection of that today.

The only recollection I have is when he came to the office in March, and when he gave me the brief that was filed—That was given, either given to him or faxed to him by someone with the Attorney General's office, and when I made the comment to him, "I hope you and Kris have done all of your activities concerning this issue out

of Las Vegas and you haven't implicated my office, and I don't have to worry about a subpoena directed to my office."

There was dead, stone silence in response to that comment. He said nothing to that comment.

Q. And this unpleasantness between you and Kris regarding the Seeno case, did it have any connection at all with the Whitehead case?

A. In hindsight maybe at the time, no, I don't think so. It had everything to do, as I understand, with the Seeno case.

Q. What was the Seeno case?

[102] A. Seeno case was a big case, the biggest case that our firm had handled during that first year.

It was a five week trial, insurance bad faith case on behalf of the Seeno Construction Company. It was against the primary carrier and excess carrier for a judgment that had been imposed against A D Seeno Construction, by reason of an underlying lawsuit where they got hit by 10.5 or 10.6 million dollars that we were trying to get from the insurance carriers.

Q. Do you know if Steve or Kris ever talked or otherwise communicated with Don Campbell regarding the Whitehead case?

A. There are a number of phone messages from Don Campbell to the Reno office of Morris, Brignone and Pickering, and Steve or Kris had been working out of the Reno office.

I believe there are a number of phone calls identified on the long distance phone sheets indicating that they returned his telephone calls, and I believe that either late in April or May, that Don Campbell purportedly became a client of the firm.

Other than that, I don't . . .

Q. Do you have any knowledge as to what these phone calls were about?

Can you say that they were about Whitehead [103] or do you not know?

A. There are some messages that are indicated in the phone message books.

Q. These exhibits?

A. Yes.

Q. One through five?

A. Yes, and if my recollection serves me, some of those messages make reference to the Whitehead matter, but I'm not specific. I can't be specific, I would differ to the documentation.

Q. Do you know why Campbell became a client of the firm?

A. No, I only have suspicions in that respect.

Q. What are your suspicions?

A. My suspicions are that if members of our firm were performing work on that file, that from a tax standpoint if we were not getting paid for that work it could be a deduction.

And also one of the things that Kris and Steve—Well, all of us, frankly, because they taught me these issues as to establish and erect very early on the attorney-client privilege, and to the extent that there may have been an effort to create that privilege to be able to insulate any communications and arguably [104] be able to protect any of those communications from discovery at a later period of time, that that may have been why he may have, like I said, purportedly became a client.

Q. Do you know if Campbell ever paid the firm any money for the services or to establish the attorney-client reltaionship?

A. That I don't know.

Q. Do you know whether a file was opened on the Campbell case or Campbell client case?

A. I know by reviewing our client number sheet, in other words, the client identification sheet, that there was a client number at some point in time, and that's where, like I said, either late April or early May that that client number appeared on our—

Q. Of what year?

A. 1994. It may have been established, and I can also look, that client number was 0173, and we established our client numbers in a sequential fashion. The very first client we had was A D Seeno Construction Company and they were client number one, in more ways than one.

And then each client that we took on thereafter was sequentially assigned a number, one, two, three, four. [105] And so the client number of 173 was numbers we were using to assign to clients that we were taking on then in the April, May timeframe of 1994.

Q. And 0173 happens to be Campbell?

A. Yes.

Q. That is Don Campbell, the former special deputy attorney general.

A. That's what was indicated on the client number sheet.

Q. Where would the client number sheet at this time be located?

A. Well, we updated the client number sheets, I believe on a regular basis, either a monthly or bimonthly basis, and so that was an ongoing production of that—I know when we first started we had one almost right away with all of the client files that we were originating with Morris, Brignone & Pickering and at least every month or couple months we got a new one up from the Las Vegas office.

It was generated out of the Las Vegas office. The Las Vegas office would send it to the Reno office and then we would use that for a variety of things.

As an example, we got a copy machine that you could punch in a number for billing purposes for [106] photocopying, being able to bill that directly to the client.

The Fax activity sheets, the expense associated with those facts, we would give that billing number to, so that client or that matter could be billed to that item.

The telephone logs have the same client number on them.

It was—The client number was for an expense purpose and so therefore from an administrative standpoint they were trying to update then that client list as needed and to inform the attorneys and the staff in the office of those client numbers.

Q. Did you ever have the opportunity to look in the Campbell file to see if there was anything contained therein?

A. No.

Q. You don't know whether there was any documents or a lot of documents in the Campbell file?

A. No, any of the Campbell file, my supposition would be, would have had its origin in Las Vegas.

The work that was being in the Reno office was being done by Nikki Laxalt, and she kept all of [107] those materials in her office.

They were not materials that were placed in the common areas. In other words, with a standard, general files, the common areas where all of the rest of the files were kept.

For instance, like all of my files, all of our closed files, things like that were kept in a common filing cabinet.

But the Campbell matter, or the information I understand that constitutes the Campbell matter, Nikki kept in her office.

Q. Would you know if any billing charges were made to Campbell?

A. I don't know the answer to that because I never saw Nikki's time sheets.

I know that there are a number of different phone messages. As an example, the one—Well, let me take that back.

I believe that some of the phone messages that went back and forth like to A D Hopkins, Timko and possibly to Mr. Campbell, for a period of time those were identified as a firm expense, and I don't think I have any recollection of seeing 0173 as being identified for a billing

purpose, like for a long distance charge or a Fax charge or anything of that [108] nature.

We had general files on both—For what we called a firm expense. It was a general firm expense, and those were delineated by nine's, and my recollection of the documents that I did a cursory review on before bringing them here is that any of the phone messages and the Fax transmission are assigned a firm expense in contrast to a Don Campbell expense.

MR. AHLSWEDE: Let's take about a five minute break.

(A recess was taken.)

BY MR. AHLSWEDE:

Q. Do you know if Morris or Pickering ever had any conversations with Brent Adams, Judge Brent Adams?

A. I don't know that, no.

Q. Do you know if they had any conversations with Judge Peter Breen?

A. I don't know that either.

Q. With Attorney General DelPapa?

A. My only knowledge is the receipt of the one brief that had been filed, that we've already talked about.

Q. Do you know whether you had any conversations with any of the justices of the Nevada [109] Supreme Court?

A. If one supposes that the meeting with Justice Rose was for the purpose of discussing the Whitehead matter, then that would be my only knowledge.

The only direct knowledge I have is that there was a meeting held by Steve with Justice Rose at about the time that the first newspaper articles began appearing concerning the Whitehead matter.

Q. Do you know whether they had any conversations with Margo Piscevich?

A. No, I have no direct knowledge of that either.

Q. Do you know whether they had any conversations with any members of the Nevada Judicial Discipline Commission, particularly Allen Laferbe?

A. No.

Q. Judge Nancy Becker?

A. No.

MR. AHLSWEDE: Off the record.

(Discussion off the record.)

BY MR. AHLSWEDE:

Q. Do you know if Morris or Pickering had any conversation with anybody named Mowbray?

A. There's one phone message from John [110] Mowbray found on the phone message pad, but other than that I don't know.

Q. And you don't know whether that was Judge John Mowbray or one of his sons?

A. No, I don't know.

Q. Do you know whether Morris or Pickering had any conversations with Leonard Gang of the Nevada Judicial Discipline Commission?

A. There are messages on the phone message pads in the October of 1993 timeframe from Leonard Gang, and I believe that there are phone calls that were returned to Leonard Gang.

Q. Do you know the subject of those phone calls?

A. The only way I would know the subject of those phone calls is if there was a notation in the phone message pad, and I don't recall if there was or wasn't.

Q. And the phone message paid to which you refer is one of the exhibits one through five; is that correct?

A. Yes, sir.

Q. And also the dates of those phone messages would be on the message pad?

A. My secretary was excellent at taking a [111] message, putting the time on there, the date on there, her initials on there, who was the caller, if they were return-

ing a call, if they wanted a call returned, if there was a message that they wanted to leave in particular.

It was part of her training, it was part of her regular business, and it was part of our regularly conducted business to have that information put on the phone message pads.

Q. Now, other than the information you had gleaned from the phone message pad, you don't know of any other conversations or meetings with Leonard Gang?

A. No, sir.

Q. I should have asked do you know of, but that's all right.

Do you know of any conversation with respect to meetings with Evan Wallick by Pickering or Morris?

A. There is a vague recollection that I have, and I'm going to try to bring this forward, that during the course of the Seeno trial, that when we just had come back from trial or something, walked in the door, either Tanya or Gina was on the phone and said "Steve, Wallick is on the phone, needs to talk to you right away," I have a vague recollection of that. But I [112] don't have anything more specific than that.

There are no phone messages from Evan Wallick and I have not examined the phone records to determine if there was any calls placed to him.

Q. You're not saying that there aren't any, you're saying that you have—exhibits one through five you have not examined to determine if there was any?

A. That's right.

And the only recollection I have is, like I said, that vague recollection of coming back from the Seeno trial one day and one of the secretaries making mention that as you walk through the doors that Wallick was on the line.

Q. Did the Seeno trial generate a lot of publicity?

A. No.

Q. Do you recall reading anything in the newspaper about the Seeno trial?

A. I dont' recall reading any publicity.

Q. Do you recall either Morris or Pickering having any conversations with any persons from Lionel, Sawyer and Collins during the pendency of the Whitehead case?

A. Well, I was a member of Morris, Brignone [113] and Pickering. I continued a certain number of my friendships with members of Lional, Sawyer and Collins, much to the chagrin of Kris and Steve, and in particular Andy as well.

And so excluding those conversations that I have, I can't give you anything more than that.

Like I said, I know that I maintained certain friendships with individuals at Lionel, Sawyer and Collins and had conversations with them, and you will see on the phone message pads where I received calls from Dick Horton, he and I had a couple cases that overlapped.

He was also a mentor of mine and he and I had lunch on occasion when I was at Morris, Brignone and Pickering, and Dan Bowen and I used to swap jokes back and forth.

Q. Dan Bowen, formally from the D A's office?

A. No, I think a different Dan Bowen. But Dan Bowen with Lionel, Sawyer and Collins, he and I continue to this date to swap jokes back and forth and so we call each other, and he's got messages on there for me, and I know that I left messages for him.

Q. Do you know whether Morris and Pickering ever initiated their own investigation of Whitehead?

A. I don't have specific knowledge that an [114] investigation was directed at Whitehead or anyone in particular.

I related earlier a conversation that I had with Nikki as to the fact that an investigation was ongoing, that there purportedly were photographs that they had obtained as to different justices, and purportedly that these photographs were going to be used to somehow demonstrate that what the Nevada Supreme Court was doing was not appropriate for what they were supposed to be doing.

Q. Did you ever see any of these purported photographs?

A. No.

Q. Your knowledge of the photographs came from Nikki Laxalt, is that it?

A. Yes.

Q. So she would be the one that could fill me in on the details of the photographs?

A. Here and—

Q. Anyone else?

A. If you ask my prediction, who they would have hired for that type of work based upon his past performance and how much they depended upon him, that would have been Al Kaplan.

And as I indicated earlier, there are a [115] number of messages during the September-October timeframe from Al Kaplin back and forth to both Kris and to Steve.

Q. And do you know what matter or matters Al Kaplin was working on at that time?

A. I do not.

There's one other individual that has a phone message on there to Kris as well.

His name is Floyd Whiteing, Floyd Whiteing is an expert in town involved in—

Q. In what town?

A. Here in Reno.

Q. Okay.

A. I've used Floyd Whiteing myself and Floyd Whiteing is an expert that deals with handwriting, paper, pen, ink samples, things of that nature that I know within the phone message pad that there's a message to Kris from Floyd Whiteing. I believe that's also in the September-October of 1993 timeframe.

Q. Do you know what case that would have been concerned with?

A. I had nothing with Floyd Whiteing at that time, and there was nothing that I was aware of that Kris was handling that involved Floyd Whiteing either.

Subsequent to—Let me make sure that I [116] fully answer your question.

Subsequently, I believe in maybe January or February I retained Floyd Whiteing for purposes of a case, but it wasn't until significantly after the phone message that I recall as in the book.

And I don't believe that Floyd ever called the office to speak with me directly. I met with him at his home and we discussed the different matters that he was working on.

Q. Do you know whether the firm ever maintained a file on Whitehead?

A. Other than the materials that were contained in Nikki's office that I have previously described to you, that's the only file that I'm aware of.

I do know, though, in part of the documentation that I brought were newspaper articles that my secretary was asked to gather for Steve. Many of those newspaper articles make mention of the Judicial Discipline Commission's investigation into Whitehead back in the '90-'91 timeframe, when he and Judge McGee endorsed who is now Judge Lane, then District Attorney Lane for his judgeship race, and Steve for some reason had a real keen interest in all of those newspaper articles and wanted those for his [117] files.

Q. Do you know of any person that Morris or Pickering would have discussed the Whitehead case with?

A. Andy Brignone was their partner and their confidante, which I understood.

Greg Morris is Steve's son, and in September of '93 there's a very odd message from Greg Morris to Steve that says "If you need some legal work or legal firepower I'm available, and if you need a character witness, I'm available too."

For some reason Greg's message struck me as very odd.

Q. Where does Greg Morris live?

A. Greg Morris lives in Las Vegas, and as a matter of fact, he shares space with the Las Vegas office of Morris, Brignone and Pickering.

Q. He is also an attorney?
A. He's also an attorney.
Q. And that is Steve's son?
A. Yes.

There's one other attorney that I note that there are a number of, for some reason that struck be as odd messages at the time. Mark Hutchinson, who is another attorney in our Las Vegas office in Morris, Brignone and Pickering's Las Vegas office, who had [118] another—A number of urgent messages, you know, "Kris, Steve, call, urgent, got more current information," you know, that type of thing, and that's all during the September-October of 1993 timeframe.

Q. You have mentioned the name earlier in your deposition of Walt Stowe, and you identified Walt Stowe as I believe the special agent in charge of the Las Vegas office of the FBI or just an FBI agent?

A. I believe that he was in charge, or at least that's what was represented to me.

Q. Do you know if he was in charge of an office, of the office, or in charge of a particular investigation?

A. I believe he was in charge of the office but I can't be certain on that.

Q. How did you meet Walt Stowe?

A. I met Walt Stowe along with his wife at a dinner party at Kris and Steve's home.

Q. Where is that home located?

A. Somewhere off Charleston Boulevard in Las Vegas.

Q. West or East Charleston?

A. I'm not that familiar with Las Vegas, and usually when I was over there I was driven to their home by either Kris or Steve. I don't know that I've [119] ever driven there myself independently.

Q. All right.

So you met Walt Stowe at a dinner party at Kris and Steve's house?

A. Yes.

Q. When you arrived at the house was Walt Stowe there or did he arrive after you arrived?

A. No.

He and his wife arrived after I had arrived.

I was there early with Kris and Steve, and if I recall specifically Kris and Steve were somewhat snapping at each other because each was late in getting home in preparing for the dinner party, and so I was helping put together cheese and celery and scrub carrots.

Q. Were you told anything about Walt Stowe by either Kris Pickering or Steve Morris?

A. Yes.

Q. What were you told and by whom?

A. There was a conversation as between the three of us, like a three-way type of a conversation. I had known of Walt Stowe before. I had heard of Walt Stowe before, who he was and who his wife was, and what office or, you know, what government agency he was [120] affiliated with, before that particular dinner party.

But in advance of that particular dinner party that evening I was given specific directions that this was somebody that I was supposed to really be nice to.

They were nice people, number one, they were fun people, number two, but more importantly they were people that given Walt's position, could be most beneficial to the firm, and therefore I was to be on my best behavior.

Q. Now, was anybody else at this dinner party?

A. Yes.

Q. Who?

A. I recall Al Benedict being there, and Andy Brignone may have been there, and possibly Ann Bursy, but I'm not entirely certain as to Ann.

And I'm pretty certain as to Andy but not entirely certain, but I do remember Al Benedict being there. I'm almost positive Al was there.

Q. Were you told what the purpose of this dinner party was?

A. No, I don't think so. I don't know if it was just kind of a casual get-together, and for the life of me I cannot remember why I was in Las Vegas.

[121] Q. Was the name Whitehead or the Whitehead case discussed at that party?

A. This was in the spring of 1993. The Whitehead matter in any of the conversations concerning it, nobody was talking about it then, so I don't have any recollection whatsoever of the Whitehead stuff being brought up.

Q. After that evening did you ever have occasion to see Walt or Marilyn Stowe again?

A. Yes.

Q. On how many occasions?

A. I saw Marilyn once, and I know that my husband saw Marilyn and Walt again.

Marilyn came to Reno. I was called in advance of Marilyn coming to Reno. I was told to be extra nice to her, take her to lunch, show her around if necessary.

Marilyn had an interest in antiques, so do I.

Kris knew of my interest in antiques as well as Marilyn. She said "If Marilyn wants to go antiquing, go antiquing."

I remember being instructed to take Marilyn to lunch and someplace nice. At the time the Pyrinees was open, I took her over to the Pyrinees, she [122] and I having lunch, and then Marilyn said she had something she wanted to do at Tahoe or Truckee or something like that and left and I went back to the office and went to work.

Q. Who paid the bill for the luncheon with Marilyn?

A. That was one of the few times that the firm picked up the tab.

Q. Was it billed ot any special account?

A. Firm expense, the firm did not give me client development or any type of leeway when it came to those types of issues, but that was one of the few times that the firm did pick up the expense.

The time that my husband told me that he saw them was when I had informed him that Walt and Marilyn along with another couple were going to be in Truckee, California.

I was given instruction that Jerry should comp them for breakfast at our restaurant in Truckee, and to make sure that they had a good time.

I told my husband that they were going to be up there, who they were, and when they would be coming and to be nice to them, and it would help me in what I wanted to accomplish with my firm.

Q. Did your husband in fact comp them to [123] breakfast?

A. He told me he did, yes.

Q. Was the firm ever billed for that breakfast?

A. Nope.

Q. That came out of your pocket or the business's pocket up there?

A. Yes.

Q. Was your husband with you at the meeting when you first met Walt Stowe in Las Vegas?

A. No.

Q. Your husband there?

A. No, I remember being down there myself, and I don't recall if it was on a case, I'm almost positive I was down there in depositions on a case or something and Kris asked me to stay over, and I did and so it was just myself being down there on some sort of business.

Q. All right.

At any other time did you have occasion to see Walt or Marilyn Stowe?

A. I met Walt Stowe once face-to-face, that was at the dinner party.

Marilyn I met that evening as well, I had lunch with Marilyn when she came up here to Reno [124] thereafter.

Those were the only times that I met directly then with Walt or Marilyn Stowe.

Oh, I take that back, wait a minute. Wait a minute. There was one time when Kris and I went to an antique show in Las Vegas and we ran into Marilyn Stowe at the antique show. And we had general, you know, conversation with Marilyn at that time. Nothing sticks out in my mind as to the content of that conversation other than us talking about antiques.

Q. Did either Kris or Steve tell you what their interest was in Walt Stowe?

A. Oh, yes.

Q. And what was that?

A. Walt Stowe headed—Or what I was informed, Walt Stowe headed the FBI in Las Vegas. He had been relocated out from New Jersey.

I was informed before we left Lionel, Sawyer of Walt Stowe and how they had met and how—Kris told me how Steve was trying to curry favor with him and trying to befriend him.

Q. Any particular reason that he wanted to befriend Walt Stowe or just in general?

A. She told me they thought Walt Stowe could [125] be influential in opening or reopening or reactivating a previous investigation into the Nevada Supreme Court.

Q. Did they say why they wanted the investigation of the Supreme Court reopened?

A. I remember Kris's specific interest in it was because she felt it may lead to an investigation into her personal belief that there was some wrongdoing associated with the Hilton-Brooks case and she thought that by opening the old investigation that involved a Tropicana case, that that could be the stepping stone for an investigation into the Hilton-Brooks case, in the two decisions that were handed down during the Hilton-Brooks case by the Nevada Supreme Court, that Kris swore were the product of some sort of bribery or corruption.

Q. Did she state the source of her knowledge of the bribe or bribery of the Supreme Court.

You said that she swore that the Supreme Court was bribed.

Did she tell you how she—Why she felt that way or what she based her knowledge on?

A. I don't recall having a specific discussion with her as to that.

But I do remember one discussion where she said that a footnote that was contained in one of the [126] Nevada Supreme Court decisions that gutted a main argument that we were advancing in the Hilton-Brooks case, and that footnote she swore could not have been included within that brief unless members of the Nevada Supreme Court had had our briefs that we had filed with the Ninth Circuit and had specifically intended to gut that particular argument, and she said there was no way that that could have—That argument and that footnote could have happened just by fortuity.

Did she ever relate to me that she had specific evidence that there was some bribery or corruption? No, it was a belief, it was always "This couldn't have happened unless there was bribery or corruption."

I remember also her once saying to me about Justice Springer and him remodeling his house and where did he get that money, and that money must have come from illicit means.

Q. Did she say what illicit means?

A. No. She just said there's no way that a sitting justice makes that kind of money to remodel their house, something like that.

Q. Did she ever mention Mrs. Springer?

A. I don't believe so.

And the reason I hesitate in giving that [127] much is that I have a vague recollection of a conversation about one of the Springer's children and her applying for a job at Lionel, Sawyer and Kris being quite adamant that the daughter should not get that job, and I don't know if there was ever any mention of Mrs. Springer during that conversation or not.

Q. Was there any reason advanced for the Springer child not getting the job at Lionel, Sawyer, why—

A. She was Justice Springer's daughter.

Q. And that was enough, that she shouldn't get the job?

A. In Kris's mind that was far too much. Therefore, no matter what her qualifications or what her experience or her expertise that she could have brought to the job, it was simply not within the realm of Kris's belief that she could have one of Justice Springer's children working within that office.

Q. And that was when Kris was at Lionel, Sawyer or was that after the firm was formed?

A. No, that was while we were at Lionel, Sawyer.

Q. Was she instrumental, was Kris instrumental in having the Springer's child not hired by the firm?

[128] A. She told me she was.

She told me that she had lobbied quite strenuously to have her not hired, and the woman, I don't know what her name was, the woman was not hired.

And if my recollection serves me, I believe that Justice Springer's daughter is married to Dick Campbell's son. Dick Campbell was a senior member of Lionel, Sawyer when I was there, so there was quite a fight internally, I was told, going on concerning the hiring then of Justice Springer's daughter.

Q. I believe we may have touched on this, but let me ask you again: Do you know whether the firm ever had any research done concerning the appointment of a special master in the Whitehead case and what would happen, what they would do if the special master were appointed?

A. The two memorandums that were contained within my chron file lead me to believe that the answer to that question is yes, and for this reason.

Both of the memorandums address first amendment concerns and the ability to seek federal court intervention into the matter, if the issue of the violation of the con-

fidentiality orders was going to be examined by the Nevada Supreme Court.

Q. Now, those memorandums are among the [129] exhibits that you produced; is that correct?

A. Yes.

And I recall a great dal of work going into those at the very minimum into its production, and by that I mean this—A draft would be given to my secretary by Nikki. Nikki would be given the typed draft back and there was all kinds of revisions, and that process went on for a long time, and I was led to believe that given Nikki's number of revisions and her amount of work that she was putting into this, that this was a very important issue that was being researched.

Q. Do you know if there was any client billed for this research, or was that a firm expense?

A. I don't know the answer to that.

Q. Did you hear any conversations about the appointment of a special master or any steps that should be taken if the special master were appointed?

A. The conversation that I had—Or the testimony I have in that regard relates to the conversation that Steve and I had when the brief was received by our offices from the Attorney General's Office.

Q. And what did—What was the nature of that conversation?

[130] A. When we got the brief Steve handed it to me and he and I discussed the contents of the brief before I read it because my recollection is that the brief or the motion itself was rather lengthy.

And Steve said that now that they wanted a special master, that special master was—They wanted to be able to investigate, then, the source of the leaks of the—That were in violation of the confidentiality order, and that the special master should be given subpoena power, and that that subpoena power—This is also what Steve was telling me, would permit, then a special master to obtain phone records and other information to make a determination into the source of those leaks.

And that's when I responded back to him, as I've told you, "I sure hope that whatever you and Kris have done in this regard you have done out of the Las Vegas office, not out of mine, and that you're not going to subject me to getting a subpoena up here for our offices."

Q. Did Steve mention anything about what plan he might have if a special master were appointed?

A. No.

Q. Did he say anything about getting ready to go on the offensive?

[131] A. No, and let me set the stage a little bit regarding this.

In February of 1993 I traveled to Las Vegas for—Or maybe it was '94-'95—February of 1994 I traveled to Las Vegas for the very purpose of trying to get Kris and Steve and Andy to make good on the many promises that they had made to me when I joined the firm, and that was a very, very bitter, acrimonious meeting.

After that point in time the relationship between myself and most of the members of the firm with the exception of Nikki and with the exception of Steve at one point trying to come back and curry favor with me was very strained, very strained.

Q. Did you ever hear them mention in any conversation among themselves or with someone else that they should be ready to take the offensive in the event a special master were appointed?

A. No conversation, the memorandums though, indicate that willingness.

Q. Has Steve Morris or Kris Pickering ever talked to you about any other persons who were helping in the effort to investigate a report on the Whitehead case?

A. The only—Like I said—recollection [132] that I have on any of that would be the other attorneys in our office, Jose Leon, Mark Hutchinson and then—

Q. Other than the ones that you have already mentioned?

A. That's right.

There were a number of instances that we did discuss Walt Stowe in general, and their attempts at, you know, trying to curry favor with him and where they would take him and how they were trying to do that, but other than that, no.

Q. And I believe you did testify that you were told by—or through Susan Bayliss, to remove the tag lines from Faxes and destroy the telephone messages.

A. The removal of the Fax tag line came directly from Steve.

Q. He made that direct—Face-to-face or over the telephone?

A. Face-to-face. It was when he handed me the brief that came from the Attorney General's office that—

Q. With the tag line on it?

A. —with the Fax tag line and said "If you're going to share this with anybody else make sure you remove the Fax tag line."

[133] The directive to destroy the telephone records came from Susan Bayliss, and there were a number of occasions where Susan followed up on that directive to my secretary, and my secretary would report those to me each and every time.

"Susan called me today, she wanted to make sure we're sticking with complying with the directive, and we don't have any phone records," and then there was one odd exchange that happened between Steve's secretary and my secretary that was related to me by my secretary, sometime in May of 1994, after the directive came to destroy all of our telephone records older than two months, so supposedly I don't have any telephone records older than two months.

Jean Parks, Steve's secretary, calls up, speaks with Tanya and says, "Steve is looking for the telephone number that he had and that he was using when he was in the Reno office working the Seeno case. Can you look on your phone records and find that phone number?"

Tanya tells her, "Jean, what do you mean? I don't have any phone records. We have a policy"—By now

my secretary tells me, because it was kind of a little bit of—I don't want say a joke between us, but it was like a private thing between us that we [134] weren't doing that.

She says "What do you mean, Jean? I don't have any phone records. We're supposed to be destroying all of those, according to Morris, Brignone and Pickering policy."

Jean supposedly responded "What policy? We don't have any policy like that."

And Tanya says "We were directed that we were supposed to destroy all of those things, so if you're asking me to go back to look at any phone records that date back to September, August 1993, we don't have anything like that."

Q. You have a sharp secretary.

A. Very sharp secretary, and she has a very good memory.

Q. Now, other than that one tag line that you were instructed to remove from the brief received from the attorney general, were you ever given instruction to remove tag lines in other matters or in all matters? Or only Whitehead matters? Or you do not know?

That was the only reference to a tag line and it related only to one instance; is that correct?

A. That's right.

I had worked a number of cases with Kris where we had looked at document control issues, and so [135] those were always like little things that we were looking for and would be aware of for being able to identify what the origin of records were and who was sending what to who and to try to create inferences from an evidentiary standpoint, and so these were issues that were something that were part and parcel of all of our cases.

Q. And as a matter of policy in your office did you leave the tag lines on all Faxes that you received?

A. Oh, yes. Oh, yes, there was no general matter of course of removing any of that stuff, absolutely none.

Q. Only one—Only that one tag line?

A. Yes.

Q. On that one brief?

A. Yes.

Q. And other than that the policy was quite the opposite, leave the tag lines on?

A. Yes.

Q. Now, other than that one brief from the Whitehead case, do you have any knowledge of any other documents that were received from the Attorney General's office?

A. No.

[136] Q. Do you know whether or not Kris Pickering or Steve Morris expected indictments from the federal grand jury regarding the Whitehead matter?

A. Yes.

Q. Explain your answer, please?

A. Steve and I were handling the case on behalf of a client.

Q. Of a client?

A. I remember on behalf of a client, Steve told me that he had originated that client, that client later told me how he had contacted our office strictly because he wanted me to handle the matter. That's why I remember this fairly specifically.

The case was assigned originally to Judge Kosach.

Our client, and this is all a matter of public record, filed a peremptory challenge against Judge Kosach.

Our reassignment was to Judge Whitehead's department.

When I relayed that reassignment to Steve over the telephone, Steve said, "When is the trial date set for?"

And I informed him that the trial date for that case had been set for March of 1995, and Steve [137] made the comment, "We don't have to worry about that, "Whitehead will be indicted by then."

Q. Did he state the source of his information?

A. No.

Q. Just that Whitehead would be indicted?

A. Yes.

Q. Do you know or have you heard who was instrumental in causing a federal grand jury to be convened regarding the Whitehead matters?

A. I could only speculate. I have no direct knowledge.

Q. Okay.

Speculate.

A. Speculation would be that because of the concerted effort to curry favor with Walt Stowe and the representations that were made to me by Kris as to Walt and their ability to use Walt and for him to reopen and to reactivate an old investigation into the Nevada Supreme Court, and if the FBI was going to be the originating governmental agency for the purposes of convening the grand jury, then that would be my speculation.

There was a matter, a conversation I remember specifically having with Kris in about the [138] December, November of 1992 timeframe, and a long, long article had run in the Las Vegas Review Journal.

That article concerned the Tropicana case, and allegations that somehow the Nevada Supreme Court had been bought off for advancing a decision in favor of one party versus another.

A big, long article, and Kris called me really, really excited and later faxed me the article and talked to me about how this was just terrific and how—I don't remember her words exactly, but she lead me to believe that she and Steve had been instrumental in getting the FBI to reopen that case, to reexamine the previous evidence that they purportedly had collected, and that she was all excited.

And then it was like at a point where she caught herself and she said, "I can't tell you any more, I shouldn't have told you as much as I did already, but you're just going to have to rest assured that this is really, really good news."

Q. Did she state directly or infer that it was through her contacts with Walt Stowe that they were able to accomplish this?

A. She stated that directly.

Q. What did she say?

A. She—Like I said, it's difficult to [139] relate the specifics of a conversation.

I will relate the generalities of the conversation.

Q. Okay.

A. It was like I said, November, December 1992 she was living in Las Vegas, I was up here in Reno.

We conversed all of the time over the telephone and she was all excited, she said that "Our work with Stowe has paid off, they're opening the Tropicana investigation. You should see the big article. It makes the Nevada Supreme Court look terrible. Justice Gunderson is finally going to get what he deserves. It won't be long before Justice Springer is going to be in similar circumstance, this is really good news."

And then like I said, that's about the time she stopped and said "I can't tell you any more, I shouldn't have told you this much already."

Q. Do you know whether Steve or Kris ever wrote any articles for the Review Journal relating to the Whitehead case?

A. I have no knowledge of that.

Q. Do you know whether Steve or Kris ever had contact with anyone at the Reno Gazette-Journal [140] regarding the Whitehead case?

A. There's a phone mesage from Steve Timko, Steve Timko I understand—

Q. Is a reporter?

A. —is a reporter with the Gazette-Journal.

Q. Do you know whether the firm ever had case materials or documents or anything in their computer concerning Whitehead?

A. I'm not computer literate, and probably the answer to that question would be an emphatic no, other than like research memorandum and understanding how my secretary would save or put that on disk or something of that nature.

That's the only information that I would have.

I do remember too, now that you say that, Steve Timko was the reporter that was reporting on the combined Ainsworth case, the combined Ainsworth case is the case that Kris and Steve was handling and Kris was very upset when that case came down adverse to her and her client.

That case received an awful lot of publicity and she was frequently in contact with Steve Timko during that period of time, and that moving forward, then, in time, that she had made some [141] reference to me, either during the Seeno trial or around that period of time of Timko again, and I just have a vague recollection of that, but I do have a recollection of that.

Q. Are you aware of any other information that you consider to be credible, and I'll add plausible or in any way regarding any person we haven't yet discussed or identified who has been involved in any attempts to discredit or malign Whitehead or any judges in that case or the Supreme Court?

A. In response to your question, the only other individual that comes to mind that Steve used to brag about his association with was Katherine Landreth, a U S attorney.

I remember very specifically him informing me as to what close friends they were and how he had been instrumental in her appointment to that position, or he claimed to have been instrumental in her appointment to that position, and this conversation that he and I had was in the context of someone that wanted very badly to have her for the Reno office of Morris, Brignone and Pickering—and for some reason Kris had—Took a profound dislike to, and I wanted to be able to help this young attorney because he was very bright, and I thought that he had a real future and the [142] attorney had informed me that he was also applying at the U S attorney's office, and I suggested to him that I might be able to get Steve to put in a good word for him.

And I had two or three conversations with Steve as to whether or not he had spoken to Katherine Landreth, and

if he had made mention and if he couldn't set up an appointment and to try to get the young attorney an audience, since we would not be able to hire him, that at the very minimum this was like the least I could do.

That's the only other individual that may be tangentially related to the Whitehead matter, and that's because of what I understand is a federal grand jury investigation that I would assume would have to be supervised by the U S Attorney's office.

Q. All right.

Are you—You mentioned that there appears to be a telephone message from Leonard Gang.

Other than that one telephone message are you aware of any conversations or communications with Leonard Gang between—Or with Leonard Gang by either Kris Pickering or Steve Morris?

A. I believe that there's more than one phone message that's in there.

[143] I have a general recollection of both Kris and Steve speaking very highly of Leonard Gang, and leading me to believe, and I can't give you any specifics, but just giving me the general impression that they were really pleased that he was at the State Bar on the disciplinary commission, and that's the position that he headed up.

Other than that conversation—Than that general recollection and the phone messages in there, I don't believe that there was any other contact with Leonard Gang that I'm aware of.

Q. Is there anything else that you can tell me, even though I haven't asked a question about, that you can think of concerning the Whitehead matter that you consider might be material or helpful?

A. Off the record.

(Discussion off the record.)

BY MR. AHLSWEDE:

Q. And last, I do show you an affidavit that was—That is purportedly made by you, would you look at it?

A. It was not purportedly made by me, it was prepared by me.

Q. Well, as far as I knew I was told that it was made by you, which I don't—I didn't want to come [144] out and say you made that. It's purportedly—as far as I was concerned it was purportedly made by you, and you affirm that it was; is that correct?

A. Yes, that is my signature on that affidavit.

Q. All right.

May we have that marked as Exhibit 18.

(Exhibit 18 was marked.)

MR. AHLSWEDE: That concludes the deposition.

I by the authority vested in me by the Supreme Court of the State of Nevada, I order that you not discuss your testimony here with anyone, that you not advise anyone that you have even been subpoenaed to give testimony.

Do you have any questions?

A. No, sir.

MR. AHLSWEDE: Thanks a lot.

I, PAT LUNDVAL, hereby declare under penalty of perjury that I have read the foregoing pages 1-144; that any changes made herein were made and initialed by me; that I have hereunto affixed my signature.

Dated: 1-1-96

/s/ Pat Lundval
PAT LUNDVAL

(If signed before a notary public have notary public fill out page 147.)

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

I, DENNIS D. STEINER, a notary public in and for the County of Washoe, State of Nevada, do hereby certify:

That I was personally present for the purpose of acting as notary public and Certified Shorthand Reporter in the matter entitled herein; that the witness was by me duly sworn;

That said transcript which appears hereinbefore was taken in verbatim stenotype notes by me and thereafter transcribed into typewriting as herein appears to the best of my knowledge, skill and ability and is a true record thereof.

/s/ Dennis D. Steiner

DENNIS D. STEINER, CSR #6A, CM

California CSR #1786 Louisiana CSR #91001

STATE OF CALIFORNIA)
) ss.
COUNTY OF NEVADA)

I, CINZIA R. PERA-GRUSZCZYNSKI, a notary public in and for the County of Nevada, State of California, do hereby certify:

That on the 1st day of January, 1996, before me personally appeared the witness whose deposition appears herein;

That the deposition was read to or by the witness;

That any changes in form or substance desired by the witness were entered upon the deposition by the witness;

That the witness thereupon signed the deposition under penalty of perjury.

DATED: At Trichee, California, this 1st day of January, 1996.

/s/ Cinzia R. Pera-Gruszczynski

APPENDIX I

Nevada Laws Governing the Nevada Commission on Judicial Discipline

Article 6 § 21(5), Nevada Constitution:

> The supreme court shall make appropriate rules for . . . [t]he confidentiality of all proceedings before the commission . . . ."

Section 5(1), Administrative and Procedural Rules for the Nevada Commission on Judicial Discipline:

> All proceedings must be confidential until there has been a determination of probable cause and a filing of a formal statement of charges.

Supreme Court, U.S.
FILED
NOV 4 1996
CLERK

No. 96-541

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

In re THE HONORABLE THOMAS L. STEFFEN, Chief Justice, Nevada Supreme Court, and THE HONORABLE CHARLES E. SPRINGER, Associate Justice, Nevada Supreme Court,

Petitioners.

OPPOSITION TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION OR, IN THE ALTERNATIVE, A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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34 pp

QUESTIONS PRESENTED

I. Whether the contention that judges who have recused themselves in one case are required to recuse themselves in a different case raises a substantial question under the Due Process Clause of the Fourteenth Amendment.

II. Whether the Petition is procedurally barred because (a) no federal question was raised in the proceedings below, (b) petitioners lack standing to bring this action, (c) the disqualification issue was waived, and (d) the petition is untimely.

PARTIES TO THE PROCEEDING AND RELIEF SOUGHT

A. Parties. The parties are as listed at page ii of the Petition, except that the Honorable C. Clifton Young, the Honorable Robert Rose, the Nevada Commission on Judicial Discipline and former District Court Judge Jerry Carr Whitehead were not parties to the proceeding below (Case No. 27847).

B. Relief Sought. Respondent Frankie Sue Del Papa, Attorney General of the State of Nevada, seeks dismissal of this Petition as untimely and for failure to present a federal question.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

NO. 96-541

In re The Honorable Thomas L. Steffen,
Chief Justice, Nevada Supreme Court, and
The Honorable Charles E. Springer,
Associate Justice, Nevada Supreme Court,
Petitioners

Opposition to Petition for Writ of Mandamus or Prohibition or, in the Alternative, a Writ of Certiorari to the Supreme Court of the State of Nevada

---

Respondent Attorney General Frankie Sue Del Papa requests that the Court deny the petition for a Writ of Mandamus or Prohibition or, in the Alternative, for a Writ of Certiorari seeking review of an opinion of the Supreme Court of the State of Nevada. The Nevada Supreme Court opinion was entered in *Del Papa v. Steffen, et al.*, and is reported at 920 P.2d 489, filed July 12, 1996. For the convenience of the Court, all citations to the opinion will be to Petitioners' Appendix A, 1a.

STATEMENT OF JURISDICTION

The Petition for Writ of Certiorari is not timely and therefore the Court does not have jurisdiction under Supreme Court Rule (Sup. Ct. R.) 13 and 28 U.S.C. 2101(c). This Court cannot properly exercise jurisdiction pursuant to 28 U.S.C. § 1257(a), since there is no federal question at issue and Petitioners failed to present a federal question for review to the Nevada Supreme Court. 28 U.S.C. § 1651(a) is not a grant of jurisdiction and writs in aid of jurisdiction may issue only where this Court may otherwise properly exercise jurisdiction.

OPINION BELOW

In the proceedings below, the opinion granting a writ of prohibition against Petitioners was entered on April 25, 1996 (Petitioners' App. G, at 133a) and is reported at 915 P.2d 245. Petitioners seek review of a July 12, 1996 opinion (Petitioners' App. A, at 1a), reported at 920 P.2d 489, which reaffirmed the final judgment and decision entered on April 25, 1996.

STATEMENT OF THE CASE

Respondent, Frankie Sue Del Papa, Attorney General of the State of Nevada, respectfully opposes the petition for a writ of mandamus or prohibition or, in the alternative, for a writ of certiorari. The petition is fatally flawed for a number of reasons: the petition is not timely; the petition does not present a federal question; and the petitioners have no standing since they have not suffered a personal injury which can be remedied by the Court. Petitioners have failed to address the criteria for certiorari review contained in Sup. Ct. R. 10. This failure is symptomatic of the meritless nature of this petition, which when reduced to its essence is simply a request to have this honorable Court act as a supervisor of a state supreme

court and decide matters of state law in accordance with the personal views of Petitioners.

A. Course of Proceedings and Disposition of the Case Below.

On December 21, 1995, Attorney General Frankie Sue Del Papa filed for a Writ of Prohibition or in the Alternative for a Writ of Mandamus in the Nevada Supreme Court, Case No. 27847, 112 Nev. 369, 915 P.2d 245 (1996). Respondent's Appendix A. The Attorney General requested that the Nevada Supreme Court prohibit Justices Steffen and Springer, Senior Justice David Zenoff, and special investigator Herbert J. Ahlswede from conducting an unlawful and unconstitutional investigation into media sources and others responsible for what Respondents, Petitioners herein, characterized as "the causes for the loss of public confidence, trust and respect for the [Nevada] Supreme Court and for the judicial system . . . ." Respondent's App. A, at 2a, 5a-6a. The *Del Papa* petition sought a ruling from the Nevada Supreme Court that under state law and constitution, the lawful jurisdiction of the Nevada Supreme Court does not encompass wide-ranging investigations into the sources of disparaging news stories and other negative commentary about the court.

Petitioners Steffen and Springer had appointed a special master to conduct an investigation in an order filed September 1, 1995, in Case No. 24598. Petitioners' App. D, at 85a-94a. Although Petitioners assert that they were concerned with the due-process rights of litigants, it is apparent that the ultimate goal of the proposed investigation was to identify and punish the Petitioners' detractors and the sources of negative press. Petitioners' App. C, at 25a-29a; D at 89a. The order appointing the special master imbued the master with extraordinary and unprecedented powers and immunities. These included the power:

1. To carry out on behalf of the panel all discovery proceedings that are provided for and authorized by the Nevada Rules of Civil Procedure and the rules of this court.

2. To administer oaths or cause oaths to be administered to all persons examined at depositions or otherwise by the Special Master.

3. To request and to have issued by the Clerk of the Supreme Court, such subpoenas and subpoenas *duces tecum* that the Special Master of the Whitehead panel of the Supreme Court shall deem necessary to carry out the duties herein assigned to him by the court.

4. To petition the *Whitehead* panel of the Supreme Court, to issue orders to show cause or other appropriate orders, whenever such orders are deemed necessary by the Special Master or the panel to carry out the purposes of this order.

5. To submit vouchers to the Chief Justice on a weekly basis for approval and payment. . . .

Id. at 89a-90a.

The order went on to cloak the master in immunity:

> It is further ordered that in all proceedings conducted by the Special Master, the Special Master shall enjoy judicial immunity as an agent and officer of the *Whitehead* panel of the Supreme Court.

Id. at 90a.

Thus, the master was specifically authorized to seek contempt orders against individuals in the course of the proposed investigation. The punitive intent of this investigation was further revealed in the order appointing the master:

> We fully understand the concerns expressed by our Legislature which indeed underscore the extent of the damage to the Nevada Supreme Court and the Nevada judiciary by sources as yet unexposed, and the need to expose and hold accountable said sources as the only effective means of restoring public respect for this court and the Nevada judicial branch of government.

Id. at 86a.

The lack of judicial authority under Nevada law to conduct such an investigation and the numerous constitutional defects and other violations of law entailed in this unprecedented venture were thoroughly briefed in the petition for writ of prohibition filed by Respondent Del Papa below. Respondent's App. A, at 1a-28a. Respondent Del Papa argued that through the appointment of the master, the Petitioners improperly assigned to themselves investigative, prosecutorial and judicial powers. *Id.* at 20a-24a.

Although the Nevada Supreme Court had made no order under Nev. R. App. P. 21(b) directing a response to Del Papa's petition, on December 22, 1995, Petitioner Springer filed a "Response to the Petition," and a motion to disqualify Justices Young, Rose, and Shearing from considering the *Del Papa* petition. Respondent's App. B, at 131a. On December 26, 1995, the Nevada Supreme Court entered an order striking portions of Springer's response and denying the motion to disqualify based on Springer's failure to submit supporting affidavits, proof of service on opposing counsel, and a brief of legal points and authorities, all of which are required by Nevada Rule of Appellate Procedure (Nev. R. App. P.) 35. Respondent's App. C, at 141a. Petitioner Springer elected not to cure these procedural and substantive deficiencies.

Petitioners Steffen and Springer filed their response to the *Del Papa* petition on January 29, 1996. Respondent's App. D, at 144a. Petitioners again requested that Justices Young, Rose, and Shearing disqualify themselves, but again failed to file a formal motion for disqualification in accordance with the requirements of Nev. R. App. P. 35. Notably, Petitioners neglected to raise the federal due-process issue under *Aetna Life Ins. Co. v. LaVoie*, 475 U.S. 813 (1986), which they have framed as the question presented by this petition.

On April 25, 1996, the Nevada Supreme Court granted Del Papa's petition for a writ of prohibition. Petitioners' App. F, at 110a-132a. The Nevada court ruled that there was no

> constitutional or legislative authority to appoint a special master to investigate the leaks of information to the press regarding secret proceedings. Accordingly, we grant Petitioner's petition for a writ of prohibition to the Respondents [Steffen, Springer, Zenoff, and Ahlswede] directing them to cease and desist from any further action in the investigation launched in Supreme Court Case No. 24598 by the appointment of a special master to determine the source of news leaks and the reason for this court's lost prestige.

Id. at 132a.

The opinion was signed by Justices Cliff Young, Robert Rose, and Miriam Shearing. Thereafter, the writ issued, was served on the respondents below, and returned to the Nevada Supreme Court on May 16, 1996. *See* Respondent's App. E, at 168a. Petitioners did not file a petition for rehearing of this judgment.

Choosing to ignore the writ of prohibition issued against them, Petitioners Steffen and Springer filed a two-judge

opinion in *Whitehead v. Nevada Commission on Judicial Discipline,* Case No. 24598, in which they declared the *Del Papa* writ of prohibition void. Petitioners' App. G, at 133a-186a. On July 12, 1996, the three justices who had issued the *Del Papa* writ issued another opinion, which did not alter the April 25, 1996, opinion and writ in its application to or impact on Petitioners. Only the clerk of the court and the appointed special master were ordered to take certain actions in the July 12, 1996, opinion, and an administrative docket order which previously voided the appointment of the special master is "incorporated by reference." Petitioners' App. 1a-6a.

In the July 12, 1996, opinion, the majority of the Nevada Supreme Court clarified that the writ issued on April 25, 1996, did not affect the outcome and relief afforded former district court judge Jerry Carr Whitehead in *Whitehead v. Nevada Commission on Judicial Discipline,* stating:

> (2) That the *Whitehead* panel gave to petitioner Whitehead the original relief sought in his petition for extraordinary relief and the undersigned majority have in no way attempted to amend, restrict or change that relief.
>
> (3) That any action of the *Whitehead* panel after granting petitioner [Whitehead] the original relief sought in his petition was extra-jurisdictional in nature.

The time for perfecting a certiorari petition to the United States Supreme Court ran from April 25, 1996, the day the writ was issued. The instant Petition was filed on October 7, 1996, 165 days after the granting of the writ of prohibition in the proceedings below. The case below was brought against Petitioners Steffen and Springer in their official capacities and thus, their personal rights were not affected. Respondent's Appendix A, at 1a.

B. Correction of Misstatements in the Petition.

Pursuant to United States Sup. Ct. R. 15.1, respondent brings to the Court's attention the following misstatements of fact contained in the petition. We have limited ourselves to correcting misstatements of fact relevant to the issue before this Court. There are many other misstatements on irrelevant matters.[1]

Petitioners misstate at page 3 of the Petition that Respondent Del Papa "sought to vacate a substantial portion of the rulings and relief entered in *Whitehead*." On the contrary, Respondent Del Papa, although recognizing that the unlawful conduct of Petitioners Steffen and Springer arose out of the *Whitehead* case, specifically limited the issues presented in her petition so as not to affect the relief afforded to Whitehead:

> This Petition does not place before the Court any substantive issue in Case No, 24598 [*Whitehead]*. Indeed all substantive issues in Case 24598 have long since been decided. That case was concluded and a writ granted by opinions[sic][2] issued on September 9, 1994 and

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[1] Since the integrity of the Attorney General's office and two members of the Supreme Court are impugned, we cannot let go unanswered the statement at page 10 of the Petition suggesting that those persons divulged confidential information. Nothing in the record of any of the proceedings before the Nevada Supreme Court lends the slightest credence to this accusation. The deposition of Pat Lundvall is devoid of any evidence to support the accusation. At the urging of the special master, Ms. Lundvall merely engaged in speculation and innuendo without factual foundation. Petitioners' App. H.

[2] On September 9, 1994, the *Whitehead* panel issued an unpublished order granting former judge Whitehead's petition and Whitehead had entered into an agreement with the United States government, in which he declared his intent to retire and agreed never to hold state judicial

February 24, 1995. This Petition presents to this Court purely legal issues regarding the lawful boundaries of jurisdiction and judicial authority.

SUMMARY OF ARGUMENT

There is no substantial question under the Fourteenth Amendment. Petitioners misread a single sentence in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 827-28 (1986), as meaning that it is a violation of the Due Process Clause for a judge who has recused to reenter the case and cast the deciding vote. There was no such issue in *Aetna*, where the judge whose participation was held improper had never recused at any stage. And *Aetna* makes it clear that the Due Process Clause demarks only the outer boundaries of judicial disqualification. Most matters of disqualification are left to Congress or, in a case like this, to the legislature and courts of the state.

Even if there were a federal question in Petitioners' claim, it cannot be heard here. It was never raised by them in the proceeding below. Petitioners, whose only interest in the case is as judges who were on the losing side of the decision, lack standing to seek review here. Any question of disqualification was waived by the failure of Petitioners to follow the procedures established by Nevada law for seeking the disqualification of a justice of the state supreme court. Finally, to the extent that Petitioners are asking for a writ of certiorari, they are out of time. They purport to be challenging the July 12, 1996, order of the Nevada Supreme Court, but it did not alter in any way the earlier order of April 25, 1996. The petition was filed on October 7, 1996, 165 days after the granting of the writ of prohibition in the proceeding

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office again in order to avoid further investigation and possible prosecution on federal offenses. Respondent's App. G, at 176a.

below. It is far outside the 90-day limit on certiorari petitions established by 28 U.S.C. § 2101(c).

REASONS FOR DENYING THE WRIT

I. THE PETITION DOES NOT RAISE A SUBSTANTIAL QUESTION UNDER THE FOURTEENTH AMENDMENT.

As Petitioners pose the question they are seeking to bring to this Court, it is whether "the Fourteenth Amendment's Due Process Clause can 'permit[] a court's decision to stand when a disqualified judge casts the deciding vote.' *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 827-28 (1986)." But there is nothing whatever in the Due Process Clause that says whether a state-court judge can vote in circumstances such as those presented here and nothing whatever in the *Aetna* case that supports their position.

Aetna is the single case on which Petitioners rely. Their reliance is misplaced. *Aetna* does not support a constitutional due-process basis for this Court to review a state-court decision. Petitioners derive great comfort from the sentence at 827-28 in which Chief Justice Burger, for the Court, said: "But we are aware of no case, and none has been called to our attention, permitting a court's decision to stand when a disqualified judge casts the deciding vote." They quote that sentence, in whole or in part, at pages i, 1, 3, 16, 20, and 23 of the petition and they cite those pages in the *Aetna* opinion at pages 3, 16, and 24. They interpret that as meaning that once a judge has recused himself he may not reenter a case. They say this in so many words at page 16 of the petition: "[O]nce judges are recused from considering the merits of a matter, they may not thereafter alter the outcome of that case. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 827-28 (1986)."

But *Aetna* does not support the interpretation they put on it. The issue they are arguing did not arise in *Aetna*. Justice Embry, who wrote the 5-4 per curiam decision of the Alabama Supreme Court in the case, never recused himself at any time. The question of recusal was raised for the first time in two motions by the losing insurance company while its application for rehearing of the court's decision was still pending before the court. The Alabama court unanimously denied the recusal motions and, by the same 5-4 vote as in its original decision, denied the motion for rehearing. Two weeks later the insurance company obtained a copy of Justice Embry's deposition in connection with his suit against Blue Cross, a suit that raised the same issue as did the case in which he had written the court's decision. The insurance company moved for leave to file a second application for rehearing based on the deposition, but that motion was denied. The insurance company then appealed to this Court. It held that Justice Embry's participation in the case violated the insurance company's due-process rights and remanded the case to the Supreme Court of Alabama for further proceedings.

Aetna says nothing about whether a state-court judge who has once recused himself or herself can return to the case at a later stage. That is wholly a question of state law on which the state court has spoken with final authority. And generally it is for state courts or legislatures to decide when recusal is required. There is a federal question, and this Court has power to act, only in those situations in which the Constitution requires disqualification. "The Due Process Clause demarks only the outer boundaries of judicial disqualification. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today." *Aetna*, 475 U.S. at 828.

Earlier in the *Aetna* opinion Chief Justice Burger, writing for the Court, had emphasized the limited role the Due Process Clause plays on questions of disqualification:

> The Court has recognized that not "[a]ll questions of judicial qualification . . . involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." *Tumey v. Ohio,* 273 U.S. 510, 523, 47 S.Ct. 437, 441, 71 L.Ed. 749 (1927); see also *FTC v. Cement Institute,* 333 U.S. 683, 702, 68 S.Ct. 793, 804, L.Ed. 1010 (1948) ("[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level"). Moreover, the traditional common-law rule was that disqualification for bias or prejudice was not permitted. See, *e.g., Clyma v. Kennedy,* 64 Conn. 310, 29 A. 539 (1894). See generally, Frank, Disqualification of Judges, 56 Yale L.J. 605 (1947).
>
> . . . .
>
> The more recent trend has been towards the adoption of statutes that permit disqualification for bias or prejudice. See *Berger v. United States,* 255 U.S. 22, 31, 11 S.Ct. 230, 232, 65 L.Ed. 481 (1921) (enforcing statute disqualifying federal judges in certain circumstances for personal bias or prejudice). See also ABA Code of Judicial Conduct, Canon 3C(1)(a) (1980) ("A judge should disqualify himself . . . where he has a personal bias or prejudice concerning a party.") But that alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause.

Aetna, 475 U.S. at 820.

Chief Justice Burger, for the Court, went on to say that it did not need to decide

> whether allegations of bias or prejudice by a judge of the type we have here would ever be sufficient under the Due Process Clause to force recusal. Certainly only in the most extreme cases would disqualification on this basis be constitutionally required, and appellant's arguments here fall well below that level.

Id. at 821.

Justice Embry was disqualified in the constitutional sense not because of his possible bias, but because he had an interest in the case and "his interest was 'direct, personal, substantial, [and] pecuniary,' *Ward, supra,* 409 U.S., at 60, (quoting *Tumey v. Ohio*, 273 U.S., at 523)." *Aetna,* 475 U.S. at 824.

The reasons that Justice Rose and Justice Young recused themselves, as stated in note 2, at page 9 of the Petition, do not amount to a direct, personal, substantial, and pecuniary interest in the case. If they showed bias—and if that bias would still have been present at the time of the September 15th, April 25th, and July 12th orders, when the issues were quite different from those presented at earlier stages in a separate and distinct case—it would fall well below the level of bias in which disqualification would be constitutionally required.

On the basis of the analysis provided in *Aetna* it is clear that the Due Process Clause is not implicated in any manner and there is simply no constitutional basis upon which to establish jurisdiction in this Court.

II. THE PETITION IS PROCEDURALLY BARRED.

Even if the Petition presented a federal question, it could not be heard here because of procedural deficiencies. The supposed federal question was never raised in the proceeding below. Petitioners lack standing to raise the issue. Petitioners failed to raise the question of disqualification of judges by the procedure required under Nevada law. And insofar as the Petition is for a writ of certiorari, it is untimely.

A. No Federal Question Was Raised in the Court Below.

"The threshold procedural requirement for Supreme Court review is that the tendered federal questions have been presented to the state courts. Many decisions announce the rule that the Supreme Court will not consider questions that are raised for the first time in seeking review of completed state proceedings." 16 WRIGHT, MILLER, COOPER & GRESSMAN, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 4022 at 696 (1977). *E.g., Webb v. Webb*, 451 U.S. 493, 495 (1981); *Illinois v. Gates*, 462 U.S. 213, 217-24 (1983).

The federal question that Petitioners seek to present in their Petition was never raised in the Nevada Supreme Court. The Response to Petitioners and two others to the *Del Papa* petition for a writ of prohibition fills 24 pages in the appendix. Respondent's App. D. In that document Petitioners cite CORPUS JURIS SECUNDUM for the proposition that it is "clear black-letter law" that a disqualified judge cannot act further in the case. But nowhere in that lengthy response do they make any reference to the Constitution of the United States. Nowhere do they cite this Court's decision in *Aetna*, which is the sole basis for the contention they make here.

That Response was filed January 29, 1996. On April 25, 1996, the Nevada Supreme Court granted the petition for a writ of prohibition. It is that writ that Petitioners challenge here. On July 5th Petitioners entered what purports to be a Supplemental Opinion in the original *Whitehead* case. In that document they purport to declare void and illegal the April 25, 1996, order of the Nevada Supreme Court. Petitioners' App. G. In the 38 pages of the July 5th document there is no reference to the Constitution of the United States. There is a bare use of the words "right of due process" but without explanation or without indicating its legal basis in the final sentence of the document. Petitioners' App. G, at 171a. There is no claim that the participation of Justices Rose and Young in the decision granting the writ of prohibition violated the Due Process Clause of the Fourteenth Amendment. There is a reference to the *Aetna* case in one paragraph, Petitioners' App. G., at 155a, but no suggestion that *Aetna* was announcing a constitutional rule applicable to the present case.

Because no federal question was raised in the state court the Petition presents nothing that this Court can consider.

B. Petitioners Do Not Have Standing to Assert a Due Process Violation.

Petitioners Steffen and Springer, as the parties attempting to invoke the federal judicial power for the first time in the lawsuit, must have standing to do so. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617-18 (1989). They fail this test.

Petitioners have not satisfied the requirement that they must have personally suffered some actual or threatened injury. In fact, the Question Presented by the Petitioners, "[w]hether the nationwide system of justice governed by the Fourteenth Amendment's due Process Clause can 'permit [] a court's decision to stand when a disqualified judge casts the deciding vote" is itself an "abstract" question the wide public signifi-

cance of which might more appropriately be addressed in the "rarified atmosphere of a debating society." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 475 (1982). *Cf. Allen v. Wright*, 468 U.S. 737, 754 (1984) (an asserted right to have the government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 223, n.13 (1974) (allegation of "the abstract injury in nonobservance of the Constitution" insufficient to confer standing). The "injury" asserted in the Petition is simply that Petitioners have been outvoted in their official capacities as justices of the court and prevented, also in their official capacities, from conducting an investigation. Numerous authorities support the conclusion that such an "injury" is insufficient to confer standing.

In *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 543-44 (1986), a group of high-school students sued a school district and various individuals in their official capacities, alleging First Amendment violations. The students prevailed. The school district did not challenge the judgment and took no appeal. One member of the board did, however, file a notice of appeal. *Id.* at 539. The question before the Court was whether one member of a school board had standing to appeal from a declaratory judgment against the board. The Court concluded that, because the judgment against the board member was not in his individual capacity, he had no standing to appeal in that capacity, and, conversely, "as a member of the School Board sued in his official capacity Mr. Youngman has no personal stake in the outcome of the litigation and therefore did not have standing to file the notice of appeal." *Id.* at 543-44.

In *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231 (9th Cir. 1980), neither the city nor its council members had standing. The city and council members alleged that the CTRPA's land-use

regulations and regional and transportation plans were unconstitutional. *Id.* at 232-33. The council members alleged that voting to enforce the regulations would violate their oaths of office to uphold the U.S. Constitution and expose themselves to civil liability, and that failure to enforce the regulations could result in personal criminal liability for their willful failure to perform their duty. *Id.* at 233. The court found no concrete injury resulting from the operation of the challenged ordinances. *Id.* at 238. Although constitutional principle divorced from concrete injury might "generate a spirited legislative or public debate," it would not support a federal case. The "official" rather than "personal" interest of the council members and their "abstract" rather than "concrete" injuries rendered their claim to standing deficient. Until a victim of the law's unconstitutional enforcement, in this case most clearly a landowner, chose to knock, the courthouse door would be barred. *Id.*

In *D'Amico v. Schweiker*, 698 F.2d 903 (7th Cir. 1983), seven administrative law judges (ALJ) of the Social Security Administration (SSA) sought an injunction against an instruction issued by the SSA to its ALJs. The ALJs had not suffered an actual or threatened injury such as reducing their pay or benefits for which they would have had standing to sue. *Id.* at 905. The court concluded that despite the ALJs' emotional stake in the case, "they are the wrong people to be raising with us the question whether the challenged instruction is lawful." *Id.* at 906. If the instruction hurt recipients of disability benefits, as the ALJs contended, "we can expect one or more of them to challenge its lawfulness in a suit in federal district court . . . ." *Id.*

In *Cronson v. Clark*, 810 F.2d 662 (7th Cir. 1987), Cronson, the Auditor General of Illinois, brought suit against the justices of the Supreme Court of Illinois and other officials. He asserted he had a legal duty under Illinois law to conduct a "full" audit of the supreme court. The Illinois Supreme Court disagreed as to the scope of his audit. When Cronson

refused to do a partial audit, the administrator of the Illinois court system filed a mandamus proceeding in the supreme court to compel Cronson to perform the partial audit. Cronson contended the proceeding violated his rights under the due process clause because the supreme court was acting as a judge in its own cause. *Id.* at 664.

The court pointed out that Cronson, in order to have standing in federal court, must show more than a violation of law; he must show the kind of actual or threatened injury that would support a lawsuit under traditional principles of common law or equity. *Id.* The court concluded the Due Process Clause did not confer on Cronson a right to conduct a more extensive audit of the Supreme Court of Illinois, and therefore he had suffered no injury on which the action could be based. "The federal court," it said, "do not sit to resolve intramural disputes among state officials over the bounds of their authority under state law." *Id.* at 665.

Petitioners have suggested no injury, either actual or threatened, such as would confer standing on them. They do not even assert personal injury. They have pointed to no victim of the conduct they characterize as unlawful other than the "nationwide system of justice." The question they have presented for review is an abstract conundrum posed in a vacuum. Like the school board member in *Bender*, the Petitioners, having been sued in their official capacities, have no personal stake in the outcome of the litigation. Like the ALJs in *D'Amico* and the council members in *City of South Lake Tahoe*, the Petitioners are the wrong persons to bring such an action before this Court; any person actually harmed by the conduct complained of would have standing, at least in federal district court. Finally, like the Auditor General in *Cronson*, the justices have merely alleged a violation of the law in being prevented from acting to the full extent of what they conceive to be their powers under state law. They can point to no deprivation of life, liberty, or property and this is a precondition to complaining of a denial of due process under the Fifth

and Fourteenth Amendments. Accordingly, Petitioners have no standing to bring this action.

C. Petitioners' Failure to Follow Established Nevada Supreme Court Procedures for Seeking Disqualification of a Justice Precludes Further Consideration of this Matter.

Nevada Rule of Appellate Procedure 35, adopted effective May 25, 1990, sets forth a specific procedure for seeking disqualification of a Nevada Supreme Court Justice. Nev. R. App. P. 35(a) cautions that: "Any ground for disqualification or recusal of a supreme court justice that is not raised in a timely manner through the filing of a formal motion or charge shall be deemed waived." Nev. R. App. P. 35(a) and (b) require the movant to file an affidavit or affidavits made upon personal knowledge supporting each and every fact alleged and a supporting brief of legal points and authorities. Further, the attorney making the motion must certify that he or she has read the motion or charge and supporting documents, and that based on personal investigation the attorney believes all grounds asserted to be legally valid and all factual allegations to be true. Thereafter, all adverse parties have ten days to file opposition to the motion, and the moving party may seek leave to file a reply.

Upon the filing a motion for disqualification, the opposition thereto, and any reply, Nev. R. App. P. 35(d) states that the motion will be decided, without further written submission from the parties. A formal motion for disqualification, supported by affidavits and legal points and authorities, should have been submitted.

Petitioners elected not to follow the Nev. R. App. P. 35 disqualification procedures they helped to establish in 1990, and thus failed to properly present and preserve their claim that Justices Rose and Young were barred from participating in the resolution of the *Del Papa* petition. Instead of

submitting formal motion and permitting the state supreme court to rule upon the matter, Petitioners elected simply to decree in their two-justice "per curiam" opinion issued July 5, 1996, that Justices Rose and Young were disqualified, and that any action taken by such justices regarding the *Del Papa* petition was null and void.

Many appellate courts have considered the issue of a litigant's failure to seek, through the submission of appropriate motions and affidavits, the disqualification of a judge in the lower court, and have concluded that a litigant's failure to raise the point in the lower court, and to follow established procedures for seeking disqualification, precludes consideration of the matter on appeal. *See, e.g.*, *Baker v. Mueller*, 222 F.2d 180, 183 (7th Cir. 1955); *United Companies Financial v. Wyers*, 518 S.2d 700, 702 (Ala. 1987); *Hermann v. Summer Plaza Corp.*, 513 A.2d 1211, 1217 (Conn. 1986); *Homestead Development Co. v. Holly Tp.*, 443 N.W.2d 385, 390 (Mich. App. 1989); *Henrickson v. Lyons*, 652 P.2d 18, 21 (Wash. App. 1982); *Matter of Estate of Baird*, 408 N.E.2d 1323, 1331 (Ind. App. 1980); *Bonnet v. Stewart*, 382 A.2d 930, 932 (N.J. Super. Ct. App. Div. 1978).

Because Petitioners failed to assert their claims of disqualification through proper procedures, Attorney General Del Papa was never afforded the opportunity to oppose Petitioners' claim under that Justices Rose and Young were disqualified from entertaining Del Papa's petition. No record on the issue was developed in the Nevada Supreme Court, and the state supreme court was never afforded the opportunity to decide the issue. Accordingly, Attorney General Del Papa submits that Petitioners should not be permitted to ignore their own duly adopted procedures, and that this Court should refuse to entertain the issue at this late date.

D. The Petition is Untimely.

The Petition asks for writ mandamus or prohibition or, in the alternative, for a writ of certiorari. To the extent that the petition seeks a writ of certiorari it is out of time. Section 2101(c) of Title 28 provides that any writ of certiorari in a civil action shall be applied for "within ninety days after the entry of judgment or decree." The 90-day limit is mandatory and jurisdictional. *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). *See also*, Sup. Ct. R. 13(1) and (2).

Initially, the Nevada Supreme Court entered an order on September 15, 1995, on its administrative docket, ADKT No. 221. Petitioners' App. B. This order held: "We therefore declare void the 'Order Appointing Special Master' entered in Docket No. 24598, and hereby prohibit the payment of any cost or expenditure associated with the appointment of said special master/prosecutor." Petitioners' App. B, at 8a. The order was signed by Respondent Justices Young and Rose, and by Justice Shearing.

Thereafter, on April 25, 1996, the Nevada Supreme Court issued a formal opinion granting Respondent Del Papa's petition for writ of prohibition, in Case No. 27847. Petitioners' App. F. This opinion held:

> Respondent Justices [Steffen and Springer] lacked constitutional or legislative authority to appoint a special master to investigate the leaks of information to the press regarding the secret proceedings.

Petitioners' App. F, at 132a.

This opinion further ordered the court clerk to issue a writ of prohibition directing Justices Steffen and Springer to:

> cease and desist from any further action in the investigation launched in Supreme Court Case No. 24598 by the appointment of a special master to determine the source of news leaks and the reason for this court's lost prestige.

Id. This opinion was a final, published opinion of the Nevada Supreme Court and is reported as *Attorney General v. Steffen*, 112 Nev. 369, 915 P.2d 245 (1996).

The opinion that Petitioners assert is the subject of the instant Petition was issued on July 12, 1996, also in Case No. 27847. Petitioners' App. A. This opinion was entered following the issuance by Steffen and Springer of a so-called "*per curiam*" opinion July 5, 1996, in Case No. 24598 purporting to vacate the Nevada Supreme Court opinion entered April 25, 1996. In the opinion entered July 12, 1996, the Court reiterated:

> [T]he special master is cloaked with judicial immunity and his activities are to be supervised only by the panel. Such a situation would place investigatory (i.e. executive) power and adjudicative power into the hands of a panel of this court, thereby presenting a situation which this court has previously disallowed because it would permit the panel to act oppressively.

Petitioners' App. A, at 3a.

The July 12, 1996, opinion incorporated the September 1995 administrative docket order: "We incorporate by reference our former order of September 15, 1995, declaring void each and every provision of the 'Order Appointing Special Master' which was filed by the *Whitehead* panel on September 1, 1995." Petitioners' App. A, 5a. The July 12, 1996, opinion did not alter or affect the relief which was granted to Attorney General Del Papa on April 25, 1996. As

noted above in Respondent's factual statement, only the clerk of the court and the special master are ordered to take certain actions in the July 12, 1996, opinion.

Where a lower court issues successive judgments in the same case, as occured here, the 90-day period commences at the time of the filing of the first judgment. It is only if the lower court has changed matters of substance, or resolved a genuine ambiguity, in a judgment previously rendered that the period for bringing a case here begins to run anew. *Federal Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-12 (1952). Put another way: "If the court did no more by the second judgment than to restate what it had decided by the first one . . . the 90 days would start to run from the first judgment." *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 910, 920 (1952).

Petitioners have acknowledged that the July 12, 1996, opinion entered in Nevada Supreme Court Case No. 27847 is no more than a reiteration of the court's holding in its April 25, 1996, opinion in the same case. In their Petition they say:

> The Mandamus Order signed by two recused justices of the Nevada Supreme Court (App. A 1a) is reported at 920 P.2d 489. That Order *reaffirms* an earlier unreported administrative order dated September 15, 1995 (App. B 7a) and an opinion dated April 25, 1996 (App. F 110a) reported at 915 P.2d 245.

Petition, at 2 (emphasis added).

Petitioners misleadingly assert that the "mandamus order" was entered against them on July 12, 1996:

> On July 12, 1996, Justices Rose, Young and Shearing filed the disputed Mandamus Order.

> Regardless of the due process obligation to refrain from deciding *Whitehead*, the disqualified justices reaffirmed their April 25, 1996, reversal of that opinion . . . . Citing as precedent — not any authoritative opinions by the state's highest court — but only their own April 25, 1996, opinion reversing the Nevada Supreme Court's confidentiality rulings in *Whitehead*. . . .

Petition, at 13.

The opinion of July 12, 1996, is not a "mandamus order." It is neither styled "mandamus order," nor does it contain any indication that it is intended as a grant of "mandamus" relief. It orders no relief against Petitioners. There can be no doubt that the writ of prohibition against Petitioners was granted and issued on April 25, 1996. Petitioners' assertion that the "disputed Mandamus Order" was filed on July 12, 1996, strains credulity and is a transparent attempt to avoid the 90-day time bar.

Respondents submit that the July 12, 1996, opinion, which is the subject of the instant petition for writ of certiorari, does not disturb or revise legal rights or obligations that were settled in the April 25, 1996, opinion granting writ of prohibition. The July opinion is but a restatement of the earlier opinion or, to use the term chosen by Petitioners, the July opinion merely "reaffirmed" the earlier, April opinion. Under the holdings of *Minneapolis-Honeywell Regulator Co.* and *Idaho Power Co.*, Petitioners' 90-day period to apply for the instant writ of certiorari commenced at the date of the first judgment, April 25, 1996. That 90-day period ended on July 24, 1996. Accordingly, the instant petition for writ of certiorari, being filed on October 7, 1996, is time-barred and should be dismissed.

CONCLUSION

The Petition should be denied in all respects.

Respectfully submitted,

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(4)

Supreme Ct., U.S.
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No. 96-541

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

In re THE HONORABLE THOMAS L. STEFFEN, Chief Justice, Nevada Supreme Court, and THE HONORABLE CHARLES E. SPRINGER, Associate Justice, Nevada Supreme Court,

Petitioners.

APPENDIX TO OPPOSITION TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION OR, IN THE ALTERNATIVE, A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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APPENDIX A

[Filed Dec. 21, 1995]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Case No. 27847

NEVADA ATTORNEY GENERAL,
FRANKIE SUE DEL PAPA,
Petitioner,

vs.

THE HONORABLE THOMAS L. STEFFEN, Chief Justice of the Nevada Supreme Court, THE HONORABLE CHARLES E. SPRINGER, Justice of the Nevada Supreme Court, THE HONORABLE DAVID ZENOFF, Senior Justice of the Nevada Supreme Court, in their official capacities and HERBERT J. AHLSWEDE, in his official capacity as Special Investigator,

Respondents.

PETITION FOR A WRIT OF
PROHIBITION OR IN THE
ALTERNATIVE FOR A WRIT OF MANDAMUS

The Petitioner, Attorney General Frankie Sue Del Papa, hereby petitions this Honorable Court, pursuant to NRS 34.150, *et seq.*, NRS 34.320, *et seq.* and NRAP 21 for issuance of a Writ of Prohibition or in the alternative for a Writ of Mandamus prohibiting and/or mandating that the Respondents cease all action in Supreme Court Case No. 24598 and in particular all action in furtherance of the

unlawful and unconstitutional investigation directed against the Petitioner and numerous unnamed individuals identified by Respondent Herbert F. Ahlswede, Special Master of the "Whitehead Court" (hereinafter Respondent Ahlswede), appointed by Respondent Justices on September 1, 1995.

Petitioner further requests the Court to enter an order immediately staying such proceedings pending its ruling on the merits of this petition. Petitioner alleges, as is more particularly described below, that Respondent Justices, by taking any further action in Case No. 24598 and by appointing and directing the Respondent special investigator to investigate Petitioner and others, and by proceeding with such investigation in violation of the order of a majority of this Court, are exceeding their lawful jurisdiction and that such actions are subject to a writ of prohibition. In the alternative Petitioner requests that this Court issue a Writ Of Mandamus directing Respondents cease all action in Case No. 24598 and discharge special investigator, Herbert F. Ahlswede from conducting any further investigatory or prosecutorial activities pursuant to the Respondents' September 1, 1995, ORDER APPOINTING SPECIAL MASTER.

I. STATEMENT OF FACTS

1. On September 1, 1995, Respondents Steffen, Springer and Zenoff signed and filed an order in Supreme Court Case No. 24598, purporting to appoint Respondent Ahlswede to investigate the sources of press stories about *Whitehead v. Comm'n on Judicial Discipline*, Supreme Court Case No. 24598 and to inquire "into the causes for the loss of public confidence, trust and respect for the Supreme Court and for the judicial system. . . . ." *See* Exhibit A attached.

2. On September 7, 1995, this Court filed a petition on the administrative docket of the court, ADKT 221, noting that there is no express authority for a panel to appoint a special prosecutor/investigator and no authority to expend

funds in this regard without a vote of a majority of the elected supreme court justices. The petition asked the Court to consider entering an order vacating the appointment of the special investigator. *See* Exhibit B attached hereto.

3. On September 15, 1995, this Court entered an order in ADKT 221 in which it found that appointment of the special master in Case No. 24598 exceeded the panel's jurisdiction and purported to authorize the expenditure of public funds. The Court further found that the appointment of a "special master/investigator" and concomitant expenditure of funds serves no legitimate purpose and amounts to a gross waste of this court's limited resources." *See* Exhibit C attached hereto.

The Court voided the order appointing the special master and prohibited the payment or any costs or related expenditures.

4. Respondent Justices have received a confidential document styled "MASTER'S INTERIM REPORT" in which the Petitioner and/or members of her staff are identified as having been a party or parties to "an intentional and knowing disclosure of confidential matters relating to the Whitehead matter before the Judicial Discipline Commission," that a statement attributed to Petitioner by a former member of the Attorney General's office purportedly made by Petitioner during a staff meeting "should be explored." Respondent Ahlswede's unsupported and insupportable allegations have caused and will continue to cause Petitioner injury unless the activities of Ahlswede authorized by Respondent Justices are stayed pending a determination of the merits of this petition and relief in the nature of a Writ of Prohibition or in the alternative Mandamus is entered by this Court following a determination of the merits of this petition.

5. On December 15, 1995, the Respondents Steffen, Springer and Zenoff entered an Opinion in Case No. 24598, which adjudged an order of the Court dated September 15,

1995, to be a nullity and of no legal force or effect. *See* Exhibit D attached hereto. The September 15, 1995, order signed by Justices Young, Rose, and Shearing had rendered the Respondents' appointment of Ahlswede void. The Respondents have attempted to reinstate the unconstitutional and unlawful appointment of Ahlswede and have confirmed, adopted and unleashed the unbridled authority on the part of Respondent Ahlswede to pursue a fabricated and baseless inquisition into the legitimate functions of Petitioner's office, the constitutionally protected speech of Petitioner and of private individuals and to engage in an interrogation of the members of the Court itself.

6. The competing Orders of September 15, 1995, and December 15, 1995, entered by Respondent Justices in Case No. 24598 and by a majority of the Supreme Court have created a constitutional crisis which the Petitioner has been drawn into by reason of her office. Petitioner submits that she has standing on her own behalf as well as the status she has as the duly elected and acting legal representative of the citizen's [sic] of the State to complain of Respondents unprecedented action in commissioning Ahlswede's activities, by acting as investigators, prosecutors and judges in a single action, and by refusing to obey an order issued by a majority of the duly elected justices of this Court.

7. Any supposed leaks of information from a case which under state law and court rules should have been open to the public pales in comparison to the self-destructive maneuvers implicated by the recent activities of the Respondents.

8. The Ahlswede appointment which Respondent Justices have attempted to reinstate, in the face of a Supreme Court order signed by a majority of the duly elected justices, dissolving the appointment is symptomatic of a crisis on the court. Unless and until the lawfully constituted authority of this Honorable Court is restored to the majority of the elected

members of the Court and the conflicting orders of the Court are reconciled by the relief requested herein, Petitioner's and others [sic] rights will be violated, and subjected to conflicting and inconsistent directives concerning an extra judicial inquisitorial process.

9. Petitioner is without an adequate remedy at law in this matter. The inquisitorial process which Respondents have initiated will subject her and others to an unconstitutional and unlawful interference with the orderly operation of her office, a denial of due process and violations of federal constitutional rights. There is no forum except this Court in which the Petitioner can presently seek relief by way of prohibition or mandamus from the Respondents' abuses of power which are set forth herein. Under these circumstances, the elected members of this Court must correct the unconstitutional and unlawful investigation that Respondents have created.

II. RELIEF SOUGHT

WHEREFORE, Petitioner prays this Court:

1. Stay all actions of Respondent Justices Steffen, Springer and Zenoff in Case No. 24598 and by Respondent Special Master Ahlswede which have been authorized by Respondent Justices pending determination of this Petition on its merits.

2. Enter an order setting an expedited scheduling order for briefing and submitting the case for decision on the briefs.

Petitioner further prays for a Writ of Prohibition or in the Alternative a Writ of Mandamus restraining Respondent Justices from taking any further action in Case No. 24598 and restraining Respondent Special Master Ahlswede from proceeding with any further activities of an investigatory or prosecutorial nature involving the Petitioner or members of her staff on the basis of the Respondent Justices [sic] order of

September 1, 1995, styled ORDER APPOINTING SPECIAL MASTER. Petitioner prays for further relief which the Court may deem appropriate in this matter.

DATED this 20th day of December, 1995.

/s/ FRANKIE SUE DEL PAPA
Attorney General
State of Nevada
State Bar No. 192
Capitol Complex
Carson City, Nevada 89710
(702) 687-3510

VERIFICATION

STATE OF NEVADA)
) ss:
CARSON CITY)

I, FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada, do hereby under penalties of perjury [sic] the following is true:

1. I am the petitioner in the above-named action.

2. I have read the foregoing Petition for a Writ of Prohibition or in the Alternative for a Writ of Mandamus and know the contents thereof and that the same are true of my own knowledge, except as to those matters stated to be upon information and belief, which matters I believe to be true.

DATED this 20th day of December, 1995.

/s/ FRANKIE SUE DEL PAPA
Attorney General
State of Nevada
State Bar No. 192
Capitol Complex
Carson City, Nevada 89710
(702) 687-3510

SIGNED AND SWORN TO before me
this 20th day of December, 1995, by
FRANKIE SUE DEL PAPA.

[seal]

/s/ REBA COOMBS
NOTARY PUBLIC

STATEMENT OF ISSUES

I. Whether the Issuance of a Writ Of Prohibition Or In The Alternative A Writ of Mandamus is Appropriate in the Circumstances of this Case.

II. Whether the Duly Elected Supreme Court Justices Are Not Disqualified To Decide The Legal Issues Presented In This Petition.

III. Whether the Secrecy Orders Entered by Respondents were Illegal and Therefore, Void.

IV. Whether a Writ of Prohibition or In the Alternative, A Writ of Mandamus must be Issued to Prevent Continued Actions by Respondents in Excess of Lawful Jurisdiction.

V. Whether Respondents Have Exceeded Their Lawful Jurisdiction By Committing Extraordinary Violations Of Due Process.

VI. Whether a Writ of Prohibition Or In The Alternative, A Writ Of Mandamus Must Be Issued To Stop Respondents Steffen, Springer and Zenoff From Continuing To Defy The Orders Of The Majority Of This Court.

POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT PROHIBITION/MANDAMUS

(Statement of Reasons Why Writ Should Issue)

The following points and authorities are respectfully submitted in support of the petition for writ of prohibition or in the alternative, for a writ of mandamus.

I. The Issuance of a Writ Of Prohibition Or In The Alternative A Writ of Mandamus is Appropriate in the Circumstances of this Case.

This request for extraordinary relief is brought under extraordinary circumstances which justify the requested relief. A writ of prohibition will issue where a tribunal has acted without or in excess of the jurisdiction of such tribunal. NRS 34.320. *See Lane v. District Court*, 104 Nev. 427, 453, 760 P.2d 1245 (1988), *Wolzinger v. Eighth Judicial Dist. Court*, 105 Nev. 160, 773 P.2d 335 (1989). A writ will furthermore only issue when no plain, speedy and adequate remedy exists in law. NRS 32. 330. *See Wardleigh v. Second Judicial District Court*, 111 Nev. Adv. Op. 22 (March 22, 1995). The purpose of prohibition is to prevent harm which would result from the judicial actions in excess of jurisdiction. *Olsen Family Trust v. Eighth Judicial Dist. Court*, 110 Nev. Adv. Op. 69, 874 P.2d 778 (1994).

A. The Respondents are Acting in Excess of Their Lawful Jurisdiction.

In this instance, the Respondent Justices, by authorizing the continuing investigation by a special investigator into alleged leaks of information, is [sic] acting in excess of its jurisdiction. The elected Court has declared the investigation at an end and has declined to fund it. The persistence of the investigator in his mission, operating at the insistence of Respondents, on some unidentified source of funding, is not

only an affront to the elected court, but is an action without jurisdiction.

B. No Plain, Speedy, Adequate Remedy Exists in Law.

This crisis will not yield to lesser measures than the order of the elected Supreme Court prohibiting the Whitehead panel's rogue mission. It is a crisis with its origins in the state's highest court; no other state tribunal may offer relief to those aggrieved. The Attorney General cannot elect any other course to protect her office from assault by the Respondents who are bent on self-vindication and retribution.

The object of the special investigator is to ferret out violators of the Whitehead panel's illegal secrecy orders for punishment. As explained, exercise of such investigative and punitive power is in excess of the Whitehead panel's jurisdiction. Writ of prohibition is an appropriate remedy to halt contempt proceedings which are in excess of jurisdiction. *See Cunningham v. Eighth Judicial Dist. Court*, 102 Nev. 551, 560-561, 729 P.2d 1328 (1986). *See also In the Matter of Two Minor Children*, 95 Nev. 225, 228, 592 P.2d 166 (1979), *G. & M. Properties v. Second Judicial Dist. Court*, 95 Nev. 301, 304, 594 P.2d 714 (1979), *Daines v. Markoff*, 92 Nev. 582, 587, 555 P.2d 490 (1976) ("one may not be held in contempt of a void order"), *Price v. Goldman*, 90 Nev. 299, 302-303, 525 P.2d 598 (1974) ("[p]rohibition lies to arrest proceedings in aid of a void order"), *Culinary Workers Union v. Eighth Judicial Dist. Court*, 66 Nev. 166, 170-171, 207 P.2d 990 (1949) ("when proceedings bear the threat of imprisonment of an individual for contempt of an invalid order of a lower court which order denied him constitutional and fundamental rights, the writ of prohibition is as proper as would be habeas corpus were he already in custody").

C. Injury will Result in the Absence of the Writ.

Prohibition is appropriate to prevent "wrong, damage, and injustice likely to follow" from a court's actions in excess of its jurisdiction. *Olsen Family Trust v. Eighth Judicial Dist. Court*, _____ Nev. _____, 874 P.2d 778 (1994). Moreover, "[c]ourts are vested with great discretion as to the issuance of a writ of prohibition, and it will only issue in cases of great necessity or urgency." *Underwriters, Inc. v. Dist. Ct.*, 61 Nev. 42, 52, 113 P.2d 616 (1941). This requirement of necessity to avert harm is plainly met in this case, which presents grave violations of fundamental constitutional rights and guarantees.

Injuries which would be perpetrated by an ongoing investigation as ordered by the Whitehead panel include chilling of core First Amendment speech by a constitutional officer of the state; gross violations of fundamental due process rights held by the purported targets of the investigation; the removal of the constitutionally-required barrier between branches of government which until now has been studiously honored; and the undermining of public confidence in the competence and impartiality of the state judicial branch, which is set upon itself and others within government in an unyielding campaign of vengeance.

II. <u>The Duly Elected Supreme Court Justices Are Not Disqualified To Decide The Legal Issues Presented In This Petition</u>.

Respondents have stated, in the order filed on December 15, 1995, that Justices Young and Rose have no authority to enter orders relating to Case No. 24598, since they recused themselves in that case.

This Petition does not place before the Court any substantive issue in Case No. 24598. Indeed all substantive issues in Case [sic] 24598 have long since been decided. That

case was concluded and a writ granted by opinions issued on September 9, 1994 and February 24, 1995. This Petition presents to this Court purely legal issues regarding the lawful boundaries of jurisdiction and judicial authority. This petition seeks to have this Court determine whether any court has the authority: 1) to bypass lawful investigative processes; 2) to appoint its own special investigator; 3) to track down the alleged violators of illegal secrecy orders, and to track down anyone who thereafter publicly criticized Respondent Justices; 4) to direct and receive secret reports from an investigator; 5) to imbue the investigator with broad powers, including subpoena power, judicial immunity and other authority; and 6) ultimately to judge and punish those persons selected for investigation. The resolution of the crisis created by Respondents may be the most significant matter which has been presented to the Nevada Supreme Court. The remaining elected justices of the Supreme Court have the obligation and sworn duty to decide this case in order to reestablish the lawful order of this Court.

III. The Secrecy Orders Entered by Respondents were Illegal and Therefore, Void.

Upon receipt of the Whitehead Petition for Writ of Prohibition, orders were issued directing that the proceedings before the Whitehead panel be kept confidential. The effect of the confidentiality order was two fold: 1) it required that all papers be sealed and all proceedings before the panel be held in private; and 2) prohibited all parties and their counsel from making any statement about the case, including the very fact of its existence.

The Respondent Justices subsequently appointed a "special master" to investigate not only the sources of the alleged leaks to the media, but also to identify anyone who, as a result of the disclosure of the Whitehead matter, may have said anything critical about the Respondents' conduct and rulings.

A Writ of Prohibition is necessary, for Respondents are exceeding their authority by employing a "special master" to seek out and punish those who may have violated their confidentiality orders or who criticized Respondents. Respondents [sic] conduct is in excess of their lawful authority as the orders of secrecy were invalid, and therefore, void. A person cannot be punished for an alleged violation of a void order.

A. Rule 5 of the Procedural Rules for the Nevada Commission on Judicial Discipline does not give the Whitehead panel authority to conduct secret proceedings.

Respondent Justices lacked the authority to conduct secret proceedings concerning Judge Whitehead's petition for writ of prohibition. Rather than rely on lawful authority, Respondents dismissed the notion of open and public forums by stating that the Whitehead petition had to be entertained in secret in order to maintain the confidentiality of the judicial discipline proceedings against Whitehead.

There is no rule, statute or constitutional provision which allows the Supreme Court to conduct its proceedings in secret. The only authority offered by Respondents for such secrecy was Rule 5 of the Rules for the Nevada Commission on Judicial Discipline (ARJD). ARJD 5 gives the Court no such authority, for its application is limited to preliminary proceedings before the Commission. The Judicial Discipline Commission was created by our Constitution (Art. 6, §21). The Constitution directs the Supreme Court to make rules for: "The confidentiality of all proceedings before the commission, except a decision to censure, retire or remove a justice or judge." Art. 6, §21, 5(a) (emphasis added).

This Court has adopted appropriate rules in response to the directive of the Constitution. The scope of the rules are set forth in ARJD 1:

> These rules carry out the obligation of the supreme court of Nevada to make appropriate rules for the confidentiality of all proceedings before the Nevada commission on judicial discipline as imposed by § 21(5)(a) of article 6 of the constitution of Nevada, ...
> (emphasis added)

In that regard ARJD 5(1) states that: "All proceedings must be confidential until there has been a determination of probable cause and a filing of formal statement of charges." Rule 5(2) defines the scope of the Commission's confidentiality:

> 'Confidentiality' encompasses all proceedings of the commission and all information and materials, written, recorded or oral, received or developed by the commission in the course of its work and relating to alleged misconduct or disability of a judge.

Clearly, the confidentiality provisions contained in the ARJD's are expressly limited by the Constitution and the rules to preliminary proceedings before the Commission regarding matters pertaining to the misconduct or disability of a judge. Rules of such specific and limited scope cannot be extended by judicial fiat to allow secret petitions for writ of prohibition before the Supreme Court.

No authority has been cited in support of a secrecy order. On the contrary, the Nevada Revised Statutes, section 1.090, requires that all proceedings be held in public.

> The sitting of every court of justice shall be public except as otherwise provided by law; but the judge of any court may exclude any minor during any criminal trial therein except such minor be on trial, or when testifying as a

> witness, or when he shall be a law student preparing to apply for a license to practice law.

The undersigned is not aware of any law that would allow the Whitehead panel to hold proceedings on a petition for writ of prohibition in secret. It must be stressed that Whitehead's petition did not go to accusations against him. Rather, it sought to arrest the proceedings of a lawful judicial body (NRS 34.320). As far back as the English common law, courtroom doors have always been open to the public (Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S.Ct. 2814 (1980)), and so is the law of Nevada.

> The common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United States, or the constitution and laws of this state, shall be the rule of decision in all the courts of this state.

NRS 1.030.

B. The Orders of Confidentiality Violate the First Amendment.

The Whitehead panel's secrecy orders violated the rights of free speech guaranteed by both the United States and Nevada constitutions.

The Whitehead panel ordered the sealing of all papers, the secrecy of all proceedings before it, and prohibited anyone from acknowledging the existence of the case. Respondents now seek to identify and punish the sources of the press stories about the Whitehead petition, and those who thereafter criticized Respondents. These actions implicate three separate First Amendment concerns. The orders denied public access to the courts and operated as a restraint on speech. The Respondents' ongoing efforts at retribution continue to chill the exercise of free speech.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> U.S. Const. Amend. 1.

The language of the Nevada Constitution is equally applicable:

> Every citizen may freely speak, write and publish his sentiments on all subjects being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecution and civil actions for libels, the truth may be given in evidence to the Jury; and if it shall appear to the Jury that the matter charged as libelous is true and was published with good motives and for justifiable ends, the party shall be acquitted or exonerated.
>
> Nev. Const. Art. 1, §9.

1. <u>Denial of Public Access to the Court.</u>

In *Richmond Newspapers, Inc. v. Virginia,* the United States Supreme Court held that the First Amendment guaranteed that criminal trials be open to the public. "The right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the amalgam of the First Amendment guarantees of speech and press; ..." *Richmond Newspapers*, 448 U.S. at 577, 100 S.Ct. at 2827. As noted by Justice Stewart in his concurring opinion, these first amendment protections apply equally to

civil trials. *Richmond Newspapers*, 448 U.S. at 599, 100 S.Ct. at 2839.

While the constitutional right of public access to the courts is not absolute, the court's ability to bar public access is extremely limited.

> ... the circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.

Globe Newspaper Company v. Superior Court for the County of Norfolk, 457 U.S. 596, 606, 102 S.Ct. 2613, 2621 (1982). *See also, Press-Enterprise Company v. Superior Court of California*, 464 U.S. 501, 104 S.Ct. 819 (1984).

This logic should apply with equal force in the context of a petition for writ of prohibition. While it may be appropriate for preliminary proceedings before the Judicial Discipline Commission to be confidential, once Whitehead sought the power of this Court to arrest those proceedings, the right of public access far outweighed any governmental interest in secrecy.

> A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted.
>
> . . . .

> People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.

Richmond Newspapers, 448 U.S. at 572-573, 100 S.Ct. at 2824-2825.

2. <u>The "gag" order and subsequent attempts to chill public comment violates the first amendment right of free speech.</u>

"Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 91 S.Ct. 1575, 1578 (1971). In *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535 (1978), the Supreme Court noted the line of cases which prohibited the use of contempt power to punish out of court statements.

> In a series of cases raising the question of whether the contempt power could be used to punish out-of-court comments concerning pending cases or grand jury investigations, this Court has consistently rejected the argument that such commentary constituted a clear and present danger to the administration of justice. ... What emerges from these cases is the 'working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished,' ... , and that a 'solidity of evidence,' ... is necessary to make the requisite showing of imminence. 'The danger must not be remote or even probable; it must immediately imperil.' ...

Landmark Communications, Inc. v. Virginia, 4354 U.S. at 845, 98 S.Ct. at 1544.

While the *Landmark* case dealt with attempts to punish the press as opposed to the sources of the information, the issues at play apply with equal force, for the efforts of the Whitehead panel to seek out and punish the alleged sources of the information to the press lies at the very core of the First Amendment.

> In *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 1437, 16 L.Ed.2d 484 (1966), this Court observed: "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." Although it is assumed that judges will ignore the public clamor or media reports and editorials in reaching their decisions and by tradition will not respond to public commentary, the law gives "[j]udges as persons, or courts as institutions . . . no greater immunity for criticism than other persons or institutions." *Bridges v. California*, 314 U.S. 252, 289, 62 S.Ct. 190, 206, 86 L.Ed. 192 (1941) (Frankfurter, J., dissenting). **The operations of the courts and the judicial conduct of judges are matters of utmost public concern.**

Landmark Communications, 435 U.S. at 838-839, 98 S.Ct. at 1541 (emphasis added).

All of the Whitehead panels' [sic] orders which relate to the secrecy of the proceedings clearly violate rights pertaining to free speech. Moreover, the gag order issued by Respondent Steffen on July 22, 1993 was unconstitutionally overbroad. *Lind v. Grimmer*, 30 F.3d 1115 (9th Cir. 1994) (Newsletter publisher could not be punished for publishing fact that he had filed a complaint with the state campaign spending

commission, the confidentiality rule was patently unconstitutional).

There can be no more compelling case for the First Amendment, freedom of speech and the public's right to know, than a case where a judge seeks to have the supreme court secretly arrest the proceedings of a lawful judicial tribunal that is considering allegations of misconduct of the part of that judge. Any such orders must be void and no one can be punished. Respondents therefore, are acting in excess of their authority and a Writ of Prohibition should issue.

IV. A Writ of Prohibition or In the Alternative, A Writ of Mandamus must be Issued to Prevent Continued Actions by Respondents in Excess of Lawful Jurisdiction.

By order entered in ADKT 221 on September 15, 1995 (September 15th order) three elected justices of this court voided the "Order Appointing Special Master" which was entered September 1, 1995 (September 1st order) in Docket 24598. Respondents now purport to resurrect the so-called special master. Respondents' action is an unlawful attempt to exercise powers reposed in the executive branch of government, and violates the due process rights of those persons whom Respondents have targeted for investigation.

The scope of the powers and duties of the special master bestowed by the Panel in the September 1st order, which include the duty to inquire into the causes for the loss of public confidence, trust and respect for the Supreme Court and for the judicial system, are unprecedented and unlawful. The degree of control which the Respondent Justices have over the special master is also unprecedented and unlawful. Respondents' order directs the special master to submit interim reports to them, and specifies that the special master may seek direction from Respondents at any time. Further, Respondents have declared the special master an officer and agent of the

court, with virtually unlimited powers, including the power to carry out discovery proceedings on behalf of the Respondents, to administer oaths to deposed persons, to have subpoenas issued and to have the Respondents issue orders to show cause or other orders when deemed necessary by the special master or Respondents. Finally, Respondents purport to cloak the special master with judicial immunity.

On December 15, 1995, the Respondents disclosed results of a secret investigation by their Master. Respondents' Master reported that he has investigated or suggests the investigation of numerous persons including news reporters, a "high federal prosecutorial official and of a mentioned FBI agent", the Attorney General and her office, other attorneys, judges and members of this court, all without legal authority save for the authority purportedly created by the Respondents in their September 1st order.

Initially, Petitioner points out that there is no specific authority for either the Supreme Court or the Respondent Justices to appoint a special master. However, when the rules of civil procedure do allow a **district court** to appoint a special master it is for certain limited purposes, restricted to evidence brought in by the parties or by witnesses brought before the master by effort of the parties. NRCP 53(a), (c) and (d). A reference by a district court to a master, in the language of the rule, "shall be the exception and not the rule," and may only be made during trial where matters are complicated or where exceptional circumstances exist. NRCP 53(b). The virtually boundless power which the Respondent Justices have purportedly given the special master, coupled with the duty to perform an investigation under Respondents' direct and constant supervision and control, removes the "special master" from any statutorily or judicially recognized concept of "master." Respondents [sic] order purports to imbue the special master with investigative and prosecutorial attributes that are reserved to the executive branch of government.

The power of the executive branch of government extends to carrying out and enforcing the laws enacted by the legislature. *Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P. 2d 237 (1967). The power of the judiciary is the authority to hear and determine justiciable controversies. *Id.* Nev. Const. art. 3, § 1 provides:

> Three separate departments; separation of powers: The powers of the Government of the State of Nevada shall be divided into three separated departments, -the Legislative, -the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases herein expressly directed or permitted.

This court has acknowledged in no uncertain terms the hazards of allowing one branch of government to usurp the power of another branch:

> The separation of powers, the independence of one branch from the others; the requirement that one department cannot exercise the powers of the other two is fundamental in our system of government. [T]here can be no liberty ... if the power of judging be not separated from the legislative and executive powers. Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be the legislator: Were it joined to the executive power the judge might behave with all the violence of an oppressor.

Galloway, 83 Nev. at 19. The primary purpose of the special master, as expressed by Respondents, is to expose and

hold accountable sources of news leaks to the media and to punish those who have publicly criticized Respondents. Petitioner submits that the duties of investigation and prosecution, are executive in nature, and have nothing to do with the judiciary's power to hear and determine justiciable controversies. Further, Respondents lack authority to appoint an investigator for the purpose of identifying and punishing those persons whom Respondents believe have caused a public loss of confidence in the Supreme Court. Respondents' actions are beyond the powers vested in the judiciary pursuant to Nev. Const. art. 3, § 1, and are unsupported by any legislative authority. This court has so held by implication in *Dickerson v. Grand Jury of Washoe Co*, 82 Nev. 113, 412 P.2d 441 (1966) (**legislative authorization** of grand jury to investigate matters affecting health and general welfare of citizens permitted inquiry into security arrangements at state hospital).

Respondents' actions also usurp the authority lawfully reposed in other governmental entities. The Nevada Commission on Judicial Discipline exists to inquire into the conduct of judges. The Nevada State Bar exists to inquire into the conduct of attorneys. The various district attorneys and law enforcement agencies exist to inquire into allegations of criminal misconduct. Rather than allow these agencies to perform their duties, the Respondents have taken it upon themselves to perform all of these roles concurrently. Respondents' appointment of the special master to execute all of these functions, with unlimited power and the purported cloak of judicial immunity, is anathema to fundamental fairness and the constitutional protections which were intended by the Framers in providing for the separation of powers and due process of law. The Respondents' circumvention of lawful procedures and their resort to the unprecedented appointment of a special master, combined with Respondents' declaration that they will direct the control [of] the investigation and prosecution of their targets, indicates Respondents are motivated by a desire for revenge and self-vindication. Justice Steffen's comments at the December 15, 1995, hearing,

relating to clearing his name and his desire to "break noses" demonstrate that revenge and self-vindication are the true motives behind Respondents' actions.

Respondents' creation of a special master, imbued with virtually unlimited powers and authority, unconstitutionally disrupts the precarious balance of power between the judicial and executive branches. This conduct violates the admonition in *Galloway*; if "[judicial power is] joined to the executive power the judge might behave with all the violence of an oppressor". *Id*, at 19.

V. Respondents Have Exceeded Their Lawful Jurisdiction By Committing Extraordinary Violations Of Due Process.

The situation facing Petitioner and the other unidentified targets of the probe is unprecedented. No Court in this country has engaged in proceedings of this type, reminiscent of the abhorrent "Star Chamber." The Star Chamber, characterized by secret, harsh and arbitrary proceedings, was abolished in England in 1641. The combination of investigative, prosecutorial and judicial function in one court not only blatantly violates the principle of separation of powers embodied in article 3, section 1, of the Nevada Constitution and the United States Constitution, it necessarily violates the constitutional due process rights of every individual subjected to the proceeding.

The actions and pronouncements of Respondents evidence their bias and personal motivations for self-vindication and retaliation against Petitioner and many others. To allow Respondents to continue in light of their many expressions of bias is a denial of justice.

Petitioner will only outline a few of the many indications of bias which are contained in the record in Case No. 24598. Petitioner refers the Court to the letter of

January 10, 1994, in which Respondents Steffen and Springer, declare that they have been libeled by the Las Vegas Review Journal's coverage of Case No. 24598, demand retractions and threaten to sue for damages *(see* Exhibit E, attached hereto); the statements in the order of September 1, 1995, in which Respondent's [sic] decry the criticism in the press as an outrage which "cannot be tolerated"; the statements of Justice Steffen at the oral argument in Case No. 24598 on May 20, 1995, that he has had to "pull the porcupine's quills out of his back" as a result of the unfavorable press coverage; and the statements by Justice Steffen at the hearing on December 15, 1995, that it is his desire to "pass on his good name to his children and grandchildren" and that he wanted to "break the noses" of those persons who have been critical in the press. Justice Steffen published a letter in the Las Vegas Sun, in apparent contravention of Judicial Canon 3(B)(9), decyring the "irresponsible" press that has maligned him. *See* Exhibit F, attached hereto.

The December 15, 1995, order had an "Interim Report" of the special master attached. The report was marked "Confidential." Nevertheless, Respondents Steffen, Springer and Zenoff made the report public by attaching it to their order. The release of this report, published without notice and an opportunity to be heard, constitutes a denial of the due process rights of Petitioner and others, protected under the Fifth and Fourteenth Amendments of the United States Constitution. In addition, the source of funding for the special master has not been identified. To the best of Petitioner's knowledge, Respondents Steffen, Springer and Zenoff have not followed the statutory procedure for acceptance and expenditure of private or donated funds in NRS ch. 353. If indeed the special investigator is being paid by a private individual such payments may constitute improper influence of a judicial officer prohibited under NRS 199.010 and NRS 199.020. These are not the statements or actions of disinterested and unbiased justices.

The most recently revealed incidence of impropriety and denial of due process is evidenced by a proposed order which was circulated in Case No. 24598 in or about September or October 1993. The attached press account indicates that Respondents Springer or Steffen circulated the proposed order which would have ruled in favor of the petitioner in Case No. 24598. *See* Exhibit G, attached hereto. The draft order contains a reference to an affidavit of attorney Don Nomura which was never filed with the Supreme Court, because attorney Nomura refused to sign the affidavit when presented to him by counsel for petitioner in Case No. 24598. *See* Exhibit H, attached hereto, p. 11, n. 1. This proposed order, referencing a non-existent affidavit, could only have been created following an improper *ex parte* contact with Whitehead or those working on his behalf. This incident must be referred to the Nevada Commission on Judicial Discipline for proper investigation and appropriate proceedings. In light of these pervasive and extreme due process violations, Respondents have exceeded their lawful jurisdiction.

VI. A Writ of Prohibition Or In The Alternative, A Writ Of Mandamus Must Be Issued To Stop Respondents Steffen, Springer and Zenoff From Continuing To Defy The Orders Of The Majority Of This Court.

The actions of Respondents Steffen, Springer and Zenoff have created an unprecedented crisis. The order of December 15, 1995, states that the Respondents will ignore any order by this Court that impacts Case No. 24598. Faced with blatant disdain for the authority and processes of this Court, there is no choice but to enter a writ to end such wayward conduct.

This Court must take action to restore the orderly processes of the Nevada Supreme Court which have been so disrupted by the actions of Respondents. In the last two and a half years Respondents have needlessly expended thousands

of hours of court time, and in their zeal to exculpate themselves have interfered and continue to interfere with the work of the Court.

The Nevada Supreme Court carries one of the highest caseloads per justice in the United States. In fiscal year 1994, the filings amounted to 274 cases per justice. This is almost three times higher than the nationally accepted standard of 100 cases per justice per year.[1] The Supreme Court has an approximate annual budget of $12 million per fiscal year. *Id.* The backlog of cases before the Court exceeded 1,300 at the end of fiscal year 1994 and continues to grow.[2] These figures suggest that each case costs the taxpayers of Nevada an average of $100,000. Given the extraordinary length of time and amount of court resources that have been expended in the Whitehead matter, the cost of this litigation to the taxpayers of this state, may well be measured in millions of dollars. The Court is clearly overloaded and the Court can ill afford to waste its time and limited resources on matters of personal vindication and vengeance. No judge or panel of judges has the authority to use the resources of Nevada for such personal purposes.

The decisions of the Court affect the quality of life of all Nevadans.[3] The continuance of Respondents' costly and illegal vendetta unreasonably, unnecessarily and illegally drains the limited resources of the Court. Respondents' actions constitute a denial of justice to all Nevadans.

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[1] Remarks of Chief Justice Steffen, Minutes, Assembly Committee on Ways and Means, February 23, 1995, p. 4.

[2] Remarks of Chief Justice Steffen before the Assembly Committee on Ways and Means, February 27, 1995, p. 10.

[3] Remarks of Chief Justice Steffen before the Assembly Committee on Ways and Means, February 23, 1995, Minutes, p. 5

Petitioner is currently faced with conflicting orders from the Nevada Supreme Court. The orders entered by Respondents on September 1, 1995, and on December 15, 1995, contradict the order entered in Administrative Docket Petition No. 221, on September 15, 1995. The orders are directly at odds with each other and only one side can stand. *Battle v. Liberty National Life Ins. Co.*, 660 F. Supp. 1449 (N.D. Ala, S.D.) (permanent injunction should issue to prevent irreparable harm from potentially conflicting orders of state court); *Alonzo v. City of Corpus Christi,* 68 F. 3d 944 (5th Cir. 1995) (city could not be placed in intolerable situation of having to choose between conflicting order and statute).

As Petitioner has argued herein, Respondents have no lawful authority to appoint a special investigator and certainly no authority to declare an order of the majority of this Court to be a "nullity." This Court cannot allow any judge, or panel of judges, to exceed the proper limits of judicial authority, and to take on executive investigative and prosecutorial functions.

The Constitution and laws of the State of Nevada provide for only one Supreme Court to decide legal case [sic] and controversies. To fail to act to end this crisis would be a disservice to the citizens of Nevada.

CONCLUSION

Based upon the foregoing, Petitioner respectfully requests the Court issue a writ of prohibition or in the alterative, mandamus against Respondents and declaring that Respondents have no authority to proceed against Petitioner or others.

DATED this 20th day of December, 1995.

/s/ FRANKIE SUE DEL PAPA
Attorney General
Capitol Complex
Carson City, Nevada 89710
(702) 687-4170

EXHIBIT A

[Filed Sep. 1, 1995]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Case No. 24598

IN RE PETITION FOR A WRIT OF
PROHIBITION OR IN THE ALTERNATIVE
FOR A WRIT OF MANDAMUS

THE HONORABLE JERRY CARR WHITEHEAD,
Petitioner,

vs.

NEVADA COMMISSION ON JUDICIAL DISCIPLINE,
Respondent.

ORDER APPOINTING SPECIAL MASTER

Explanatory Recitals. This order appointing a Special Master is entered pursuant to and in conformance with this court's formal opinion issued July 26, 1994, Whitehead v. Comm'n On Jud. Discipline, 110 Nev. ___, ___, 878 P.2d 913, 923 (1994), and to respond in spirit to the 1995 Legislature's Senate Concurrent Resolution No. 10.

On July 26, 1994, the Whitehead court ruled that a Special Master "be appointed by the court" and empowered by "specific order of this court to conduct such investigations

as shall be necessary to determine the sources of the unlawful breaches of confidentiality that may have occurred in these proceedings and the extent to which they may have impacted on Petitioner's due process rights."

In the Whitehead court's opinion filed February 24, 1995 (Whitehead v. Comm'n On Jud. Discipline, Advance Opinion 11, 111 Nev. _____ (1995)), the Whitehead court expressly retained jurisdiction "to carry forward and implement all determinations and rulings that we have made in the course of these proceedings or will make in the future." This appointment of the Special Master implements the earlier order of the court ordering the appointment of a Special Master and represents a continuance of the Whitehead court's jurisdiction to see all aspects of this proceeding through its finality.

On March 31, 1995, the Legislature adopted senate Concurrent Resolution No. 10, in which the Legislature proclaimed that it is "imperative that the citizens of this state have trust in and respect for the administration of the judicial system in this state" and urged the court to "consider measures" which would "foster public confidence and trust in the court system." The court respectfully honors the substance and intent of the Legislature's resolution and accepts the reality underlying the resolution, namely, that public confidence, trust and respect for this court and for the "judicial system of this state" have been brought into question as a result of the manner in which this court's decision-making in the captioned case has been negatively portrayed in the public media. We fully understand the concerns expressed by our Legislature which indeed underscore the extent of the damage to the Nevada Supreme Court and the Nevada judiciary by sources as yet unexposed, and the need to expose and hold accountable said sources as the only effective means of restoring public respect for this court and the Nevada judicial branch of government.

In issuing four major opinions and several orders in the Whitehead original proceeding for extraordinary relief, this court essentially ruled that: (1) the petitioner had been prosecuted before the Discipline Commission in a manner that was in excess of the Commission's jurisdiction; (2) it was necessary to interpret, for the first time, the Commission's procedural rules and constitutional prerogatives, which the court did; (3) the Commission must in the future abide by its rules; and (4) that the Commission could proceed in the lawful processing of the Whitehead matter pursuant to sworn complaints and in accordance with its rules and the demands of due process.

Despite the foregoing, this court has been the object of such massive and unrelenting criticism in the handling of this case as to do serious damage to the public's trust, confidence and respect for the court. Of equal or greater importance, the damage inflicted on this court by unnamed forces, has included a marked interference with the administration of justice in the above-captioned matter, a marked impact on the capacity of this court and the Discipline Commission to provide due process in said matter, and marked damage to the independence of the court system in general and the supreme court in particular.

Recognizing these facts and the most serious need for their resolution, and wishing to provide a meaningful response to Senate Concurrent Resolution 10, to "consider measures" designed, in accordance with the resolution, to "foster public confidence and trust in the court system," and to formulate a public information program which will, in part, utilize the report and recommendations of the Special Master, we issue this order of appointment in the hope that effective measures will eventuate that will help to avoid future unwarranted degradation and erosion of the independence of the court and of the judicial system as a whole.

Finally, we note that the Special Master's appointment is now more necessary than ever, because much of what has been orchestrated and perpetrated against this court and the judiciary in general is far more serious than the breaches of a lawful order of confidentiality; rather, it has amounted to clear and concerted efforts to interfere in the proper and lawful administration of justice. These powerful and covertly fueled attacks on the independence of the Nevada judiciary and the specific administration of justice cannot be tolerated.

APPOINTMENT OF SPECIAL MASTER

As stated above, the Whitehead court has previously ordered that a Special Master be appointed. In conformity with our previous order, and in response to the spirit of the Legislature's Concurrent Resolution No. 10, HERBERT F. AHLSWEDE is hereby appointed as a Special Master of the Whitehead court to act as an officer and agent of the court, in accordance with the statement of duties and powers set forth in this order. If, for any reason the said HERBERT F. AHLSWEDE is unable to continue with his duties as Special Master, the Whitehead court shall promptly appoint a successor to see that the work of the Special Master is brought to a timely and effective conclusion.

Duties and Powers of the Special Master: The duties of the Special Master of the Whitehead court shall include any and all inquiries into the causes for the loss of public confidence, trust and respect for the Supreme Court and for the judicial system which are related to the above-captioned matter and which are referred to in the recitals above. As noted previously, the Special Master shall provide special attention to the interference with the administration of justice and the breaches of confidentiality that have so seriously impacted the efforts of this court to honorably, promptly, and effectively process the above-captioned matter. The Special Master shall, after making all appropriate inquiry, file with the Whitehead court a written report and recommendation,

concerning the results of his investigatory efforts. From time-to-time the Special Master shall also file interim reports with the panel assigned to the above-captioned matter, and may at any time seek direction from said panel. The Special Master may also make recommendations as to what course the Whitehead court should take in the future to ensure continued public confidence in the Supreme Court and in the judicial system of this state.

The powers of the Special Master of the Whitehead panel of the Supreme Court shall, as an officer and agent of said panel, include, in addition to the general powers inherent in his appointment as a Special Master, the following:

1. To carry out on behalf of the panel all discovery proceedings that are provided for and authorized by the Nevada Rules of Civil Procedure and the rules of this court.

2. To administer oaths or cause oaths to be administered to all persons examined at deposition or otherwise by the Special Master.

3. To request and to have issued by the Clerk of the Supreme Court, such subpoenas and subpoenas duces tecum that the special Master of the Whitehead panel of the Supreme Court shall deem necessary to carry out the duties herein assigned to him by the court.

4. To petition the Whitehead panel of the Supreme Court, to issue orders to show cause or other appropriate orders, whenever such orders are deemed necessary by the Special Master or the panel to carry out the purposes of this order.

5. To submit vouchers to the Chief Justice on a weekly basis for approval and payment. In this regard, it is understood that the Special Master shall be paid an hourly rate

of $145, which is the same rate that Special Deputy Attorney General Donald J. Campbell received in his investigative and prosecutorial duties in the above-captioned matter. The Special Master is admonished that this panel must be mindful of costs and fees incurred in this matter and enlists the support of the Special Master in maximizing his efforts at a minimum overall cost.

Judicial Immunity. It is further ordered that in all proceedings conducted by the Special Master, the Special Master shall enjoy judicial immunity as an agent and officer of the Whitehead panel of the Supreme Court.

/s/ STEFFEN, C.J.

/s/ SPRINGER, J.

/s/ ZENOFF, Sr. J.[1]

/s/ GUY, D.J.[2]

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[1] The Honorable Thomas L. Steffen, then Vice-Chief Justice, assigned The Honorable David Zenoff, Senior Justice, to sit in the place of The Honorable Robert E. Rose, then Chief Justice. Nev. Const., art. 6, § 19; SCR 10.

[2] The Governor appointed The Honorable Addeliar D. Guy, Judge of the Eighth Judicial District Court, to sit in place of The Honorable Cliff Young, Justice, who recused himself. Nev. Const., art. 6, § 4.

Editorial addendum: Justice Shearing has consistently opposed the appointment of a master, and in her February 24, 1994, dissent stated that she "would rescind the order appointing a master." Justice Shearing was nevertheless invited to join in this order. She declined to do so.

cc: Frank Brusa, Chairman, Judicial Discipline Commission
Herbert F. Ahlswede
Ohlson & Springgate
Hamilton & Lynch
Gentile, Porter & Kelesis
Laura Wightman FitzSimmons
Peter Alpert
Gerald Stern
Leo Puccinelli
Geoffrey Giles
Guy A. Zoghby

[Filed Sep. 6, 1995]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Case No. 24598

IN RE PETITION FOR A WRIT OF
PROHIBITION OR IN THE ALTERNATIVE
FOR A WRIT OF MANDAMUS

THE HONORABLE JERRY CARR WHITEHEAD,
Petitioner,

vs.

NEVADA COMMISSION ON JUDICIAL DISCIPLINE,
Respondent.

DISSENT TO ORDER APPOINTING SPECIAL MASTER

SHEARING, J., dissenting:

This dissent is being filed separately because a copy of the Order Appointing Special Master was not presented to me until after it was filed and the opportunity to participate in any discussions regarding the order's content was foreclosed to me.

I have explained my opposition to the appointment of a special master in my prior dissents in this case. Yet, I must

dissent to this order because the order itself and the powers it confers upon the special master exceed the ostensible purpose of resolving any issues remaining in this case.

The majority of the special Whitehead panel initially sought to appoint a special master to determine how or from whom the media obtained information about the case at a time when this court had sealed the proceedings. This order exceeds that scope, ordering the master to conduct "inquiries into the causes for the loss of public confidence, trust and respect for the Supreme Court and for the judicial system which are related to the above-captioned matter."

My objections to this order are manyfold. I am astounded that the majority of the panel believes that public criticism has resulted in "a marked interference with the administration of justice" and "a marked impact on the capacity of this court and the Discipline Commission to provide due process in said matter, and marked damage to the independence of the court system in general and the supreme court in particular. Public scrutiny assists institutions in improving their ability to serve the public -- the court should welcome it! The idea that such attention hampers the court's operations and must therefore be investigated and presumably squelch-d is ludicrous and frightening. The personal discomfort of those who are the subject of criticism should not hamper either the operation or the independence of the court.

Instead of investigating how its own handling of this case could have been improved, the majority of this panel appears to have already decided that "unnamed forces" and the "massive and unrelenting criticism in the handling of this case" are the villains in the loss of public confidence. The panel majority decries "powerful and covertly fueled attacks on the independence of the judiciary and the specific administration of justice." With conclusions like these in the charging order, it is difficult to see how the investigation can possibly be objective. From these statements, it appears that the panel

majority's agenda is to search out and attack those who criticize the court.

The order purports to respond to Senate Concurrent Resolution No. 10. This panel has no business responding to a resolution directed to the duly-constituted Nevada Supreme Court. The panel was appointed for a specific purpose, namely, to resolve Judge Whitehead's petition. That matter has been resolved. Now this same panel exceeds its mandate by responding to the Nevada legislature. The panel presumes to speak for the entire court by conducting an investigation into the causes for the loss of public confidence in the court. A minority of the duly-constituted Nevada Supreme Court is usurping the responsibility of the majority of the court and spending the court's funds without authorization in the process. The Senate resolution is directed at the Nevada Supreme Court, not at a majority of a special panel of that court which excludes three members of the court.

In addition, the majority of the panel has interpreted statements of the Senate resolution out of context. The charging paragraph of Senate Concurrent Resolution No. 10 is as follows:

> RESOLVED BY THE SENATE OF THE STATE OF NEVADA, THE ASSEMBLY CONCURRING, that the Nevada Legislature respectfully urges the Chief Justice and Associate Justices of the Supreme Court of Nevada to examine judicial accountability in this state and to consider measures to enhance the administration of the courts and foster public confidence and trust in the court system in this state.

The thrust of the charge is that we should enhance the administration of the court in order to foster public confidence, not that we should conduct a massive investigation of anyone who criticizes us.

I consider the appointment of an investigator for the purpose of making inquiry into the causes for the loss of public confidence, trust, and respect for the Nevada Supreme Court nothing short of outrageous when that investigator is specifically directed to report to and make recommendations to, not the Nevada Supreme Court, but "the Whitehead court."

I am gravely concerned about bestowing extensive powers upon a private investigator in a nebulous search for "causes of the loss of public confidence." The order seemingly subjects anyone and anything to investigation as the special master sees fit. Anyone who has ever had any dealings with the court or commented on the proceedings could be subject to investigation. The investigator is granted the full opportunity for discovery under the Nevada Rules of Civil Procedure, and subpoena power for both persons and documents. There is no indication of what protections would be available to those persons being investigated in this unique proceeding.

The panel majority warns that it will issue orders to show cause or other appropriate orders "whenever such orders are deemed necessary by the Special Master." The panel majority also grants the investigator judicial immunity. The authority of the court, let alone a special panel, to grant such immunity is itself questionable. Furthermore, granting judicial immunity is unwarranted when the investigator is not performing judicial functions. The sole purpose of the investigator is to conduct investigations outside the court. This is not a "judicial" function contemplated by our common law system. The order confers draconian powers to a private investigator with no accountability.

Since Judge Whitehead's petition has been disposed of, the only arguable ground on which the panel may retain jurisdiction is to enforce its 1993 order of confidentiality. Now the majority of the panel has indicated in its Order Appointing Special Master that enforcement of the 1993 order is no longer

important. Rather, they believe that counteracting the criticism of the court is more deserving of attention.

That the order was even issued exemplifies the reasons that public confidence in the court has waned. Therefore, I dissent.

/s/ SHEARING, J.

cc: Frank Brusa, Chairman, Judicial Discipline Commission
Herbert F. Ahlswede
Ohlson & Springgate
Hamilton & Lynch
Gentile, Porter & Kelesis
Laura Wightman Fitzsimmons
Peter Alpert
Gerald Stern
Leo Puccinelli
Geoffrey Giles
Guy A. Zoghby

EXHIBIT B

[Filed Sep. 7, 1995]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

ADKT 221

PETITION FOR AN ORDER
RESCINDING APPOINTMENT OF SPECIAL
MASTER ENTERED SEPTEMBER 1, 1995,
AND VOIDING ASSOCIATED EXPENSES

PETITION

COMES NOW, Vice Chief Justice Cliff Young and Justices Miriam Shearing and Bob Rose and request that the Nevada Supreme Court enter an order canceling the appointment of the special master made by order entered September 1, 1995, to investigate the reason for the negative press and the source of breaches of confidentiality that occurred in the case of Whitehead v. Comm'n on Jud. Discipline (110 Nev. 128, 869 P.2d 795 (1994); 110 Nev. 380, 873 P.2d 946 (1994); 110 Nev. 874, 878 P.2d 913 (1994); 111 Nev. 70, 893 P.2d 866 (1995)), and that any expenses for the appointment of said special master/prosecutor be declared improper and incurred without authority.

The undersigned believe that the order appointing a special master/prosecutor filed September 1, 1995, signed by Chief Justice Thomas Steffen, Justice Charles Springer, Senior

Justice David Zenoff, and District Judge Del Guy, four of the five members of the Whitehead panel, was done without legal authority and that the panel cannot authorize the public expenditure of money to finance the special master/ prosecutor's activities. This appointment and attempted expenditure of funds is improper and without legal authority because:

1. There is no express authority for a panel to appoint a special master, which is really the appointment of a special prosecutor to investigate and report breaches of confidentiality and what is called the interference with the administration of justice because the Whitehead panel received adverse publicity. The panel cites one of its own opinions issued a year ago for authority to appoint a special master. However, a court or panel cannot create jurisdiction when none originally existed. Cf. KDI Sylvan Pools v. Workman, 107 Nev. 340, 343, 810 P.2d 1217, 1219 (1991). Further, Senate Concurrent Resolution No. 10 gave no express or implied authority for the panel to launch a new program with public funds. The resolution simply urged this Court to promote trust and confidence by espousing openness, access to court information, and judicial accountability. The appointment of a special master/prosecutor to launch a new court activity with public funds was beyond the jurisdiction of the Whitehead panel.

2. Even if such legal authority exists, the appointment must be authorized by at least three of the elected five Supreme Court Justices. Rule 7 of the Supreme Court Rules states that court administration and the authority to spend money is controlled by a majority of the Court. It expressly states that the Court and Chief Justice shall be "bound by any decision or order that may be entered by a majority of the Court." SCR 7(4). A majority of the Court does not favor the appointment of the special master/prosecutor or the expenditure of unauthorized funds to support the special master/ prosecutor's activities.

3. The Legislature did not authorize the expenditure of money on a special master or prosecutor, and no such request to fund this investigation was made to the Legislature by Chief Justice Steffen or Justice Springer; and even if the funds were appropriated for this purpose, the approval of three elected Justices of the Nevada Supreme Court is required before funds in the Supreme Court budget can be expended as previously stated.

4. We question the wisdom of spending a substantial amount of money attempting to identify the breaches of confidentiality or "leaks" and the reason for the adverse press that occurred in the Whitehead case. A special master does not have to be appointed to determine why the Whitehead panel has received substantial criticism--it is the action and opinions of the panel itself that drew the great adverse reaction and comment. The opinions issued by the panel have been extremely critical of the Nevada Judicial Discipline Commission, its former chairman Guy Shipler, its former counsel attorney Don Campbell and Attorney General Frankie Sue Del Papa, and individual members of the Nevada judiciary, and the appointment of a special master/prosecutor will be viewed as a retaliatory effort against those individuals and authorizing a "witch hunt" of everyone who has opposed the activities and opinions issued by a majority of the Whitehead panel.

Identifying the individual or individuals who breached confidentiality seems remote, and the undefined duties of the special master/prosecutor can lead to an abuse of power and more adverse publicity. Rather than restore confidence and trust in the Nevada judiciary, the operation of this special master/prosecutor will do just the opposite, and the appointment already gives the appearance of being a vindictive and vengeful act by the majority of the Whitehead panel.

WHEREFORE, petitioners Vice Chief Justice Cliff Young and Justices Miriam Shearing and Bob Rose request that a public hearing on this ADKT be held at noon on

September 15, 1995, or as soon thereafter as possible, to consider entering an order vacating the Whitehead panel's order appointing special master/prosecutor filed September 1, 1995, and prohibiting the payment of any cost or expenditure associated with the appointment of said special master/ prosecutor. The Clerk of the Court is directed to schedule and notice this public hearing.

/s/ YOUNG, V.C.J.

/s/ SHEARING, J.

/s/ ROSE, J.

EXHIBIT C

[Filed Sep. 15, 1995]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

ADKT 221

PETITION FOR AN ORDER
RESCINDING APPOINTMENT OF SPECIAL
MASTER ENTERED SEPTEMBER 1, 1995,
AND VOIDING ASSOCIATED EXPENSES

ORDER GRANTING PETITION AND
VACATING ORDER APPOINTING SPECIAL MASTER

On September 7, 1995, the undersigned petitioned the elected justices of this court to review actions taken by a panel constituted to hear and decide the matter of Whitehead vs. Nevada Commission on Judicial Discipline, Docket No. 24598. Our petition was prompted by the panel's issuance of an order, signed by only two of the elected justices of this court, appointing a special master/prosecutor, and directing the expenditure of public funds to facilitate the special master/prosecutor's activities. This order was entered by a majority of the panel constituted to hear and decide only the Whitehead matter. Because the order exceeds the panel's jurisdiction to decide the case before it and purports to authorize the expenditure of public funds, we are compelled to act in our administrative capacity to protect this court's resources and to govern the programs pursued by the court.

The administration of this court and the utilization of court resources must be authorized by at least three of the five elected Supreme Court Justices, i.e., a majority of this court. SCR 7(1); SCR 7(4). Any administrative action is null and void if a majority of the court disagrees with it. SCR 7(8). The Whitehead court issued its final decision in this matter on September 9, 1994. See Whitehead v. Comm'n on Jud. Discipline, 111 Nev. 70, 893 P.2d 866 n.1 (Adv. Opn. 11, February 24, 1995). The "order Appointing Special Master," was entered one year after entry of judgment in that matter "In the hope that effective measures will eventuate that will help to avoid future unwarranted degradation and erosion of the independence of the court and of the judicial system as a whole." (Emphasis in the original.) The undersigned, a majority of the duly elected Supreme Court Justices, determine that the appointment of a special master/prosecutor and concomitant expenditure of funds serves no legitimate purpose and amounts to a gross waste of this court's limited resources. We therefore declare void the "Order Appointing Special Master" entered in Docket No. 24598, and hereby prohibit the payment of any cost or expenditure associated with the appointment of said special master/prosecutor.

It is so ORDERED.

/s/ YOUNG, V.C.J.

/s/ SHEARING, J.

/s/ ROSE, J.

EXHIBIT D

[Filed Dec. 15, 1995]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Case No. 24598

IN RE PETITION FOR A WRIT OF
PROHIBITION OR IN THE ALTERNATIVE
FOR A WRIT OF MANDAMUS

THE HONORABLE JERRY CARR WHITEHEAD,
Petitioner,

vs.

NEVADA COMMISSION ON JUDICIAL DISCIPLINE,
Respondent.

Original proceedings; declaration and judgment invalidating unlawful attempt to interfere with jurisdiction of this panel.

Judgment declaring three-justice order a nullity.

Ohlson & Sringgate, Reno; Hamilton & Lynch, Reno; Gentile and Porter, Las Vegas; Laura Wightman FitzSimmons, Las Vegas,
for Petitioner

Leonard I Gang, Carson City,
for Respondent

Peter Alpert, Las Vegas; Gerald Stern, New York,
for Amicus Curiae Association of Disciplinary Counsel.

Leo Puccinelli, Elko,
for Amicus Curiae Ad Hoc Committee for the Preservation of an Independent Judiciary

Geoffrey Giles, Reno,
for Amicus Curiae American Judicature Society

OPINION

PER CURIAM:

The following opinion and judgment of the court constitutes an unprecedented but necessary response to a certain document filed by the dissenting justice and two disqualified justices in one of the court's administrative files on September 15, 1995. The document in question purports to be an "order" declaring actions of this court to be "void," and otherwise overruling substantive rulings of the constitutionally-empaneled court sitting in this case. Because two of the justices who signed the mentioned order were disqualified to act in this case, because notice and due process were denied to both parties to this action, the Judicial Discipline Commission and Judge Whitehead, and because the mentioned justices are in a position of conflict of interest, the

"order" appearing in the form of the mentioned administrative document must be declared null and of no force or effect.

On September 15, 1995, the dissenting justice, Justice Shearing, and the disqualified justices, Justices Young and Rose, signed and filed an "administrative" document that bears the title, "Order Granting Petition and Vacating Order Appointing Special Master[1]." The referenced document purports, unlawfully, to nullify and set aside a previous judgment of this court granting a motion filed by petitioner Whitehead. This court ruled in July, 1994, as follows:

> A special master shall hereafter be appointed by the court and shall be specially empowered by further and specific order of this court to conduct such investigations as shall be necessary to determine the sources of the unlawful breaches of confidentiality that have occurred in these proceedings and the extent to which they may have impacted Petitioner's due process rights.

The September 15, 1995 document purports to overrule the decision above-quoted, and, additionally, purports to "declare[] void the 'Order Appointing Special Master' entered in Docket No. 24598" (the above-captioned matter). Neither counsel for the Commission nor Judge Whitehead was given any notice or the due process right to be heard prior to the signing and administrative filing of the mentioned "order" which purports to contravene the "law of the case" in this matter and to declare vital aspects of the decisions of the

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[1] A copy of the subject order is attached to this opinion.

Whitehead court to be void. In addition to the other infirmities inherent in the September 15 document, the signing justices are in a position of conflict of interest, which prevents them from acting to stop the investigation in progress at the time the September 15 document was filed. (See Master's Report attached and made a part hereof.)

In addition to filing the subject September 15 document, the two disqualified justices (Justices Young and Rose) have recently announced their intention to go beyond merely declaring the appointment of the special master void in this case. Justices Young, Rose and Shearing have recently announced their intention to sign, on December 15, 1995, another similar administrative "order", at another "administrative conference," in which the three justices propose to declare "that the authority and existence of the Whitehead panel be terminated formally to end the existence of a legal body whose time has come and gone."

In sum, then, the dissenting justice, Justice Shearing, and the two justices who were heretofore disqualified from sitting in this case, Justices Young and Rose, have, without any authority for doing so, signed an "administrative" order that pretends to reverse and invalidate significant rulings of the Whitehead court. The same three justices have recently announced their intention to sign another similar "administrative order" which would purport to disband and terminate "the authority and existence" of the court as constituted in this case. The only basis presented by Justices Young, Rose and Shearing for their attempts to reverse the judgment of the court is their unsupported (and unsupportable) statement that this court's orders relative to the appointment of a master were in some unstated way, "done without legal authority." The stated reason for trying to dissolve this panel of the court is that the existence of the panel should be terminated because its "time has come and gone."

There is no need to cite legal authority for the proposition that disqualified justices are not empowered to alter the formal adjudications made by the court in this case. It would be idle for anyone to argue that disqualified justices have the legal power or authority to countermand a duly-entered judgment of this court under the guise of some supposed right inherent in their being elected members of the court. It is equally obvious that if the "order" of September 15, 1995, signed by Justices Young, Shearing and Rose had any conceivable legal effect (as it clearly does not), such an order would be clearly violative of the parties' due process rights to notice and the opportunity to be heard. Seeing no need for further discussion of this matter, the court enters the following judgment:

1. The order signed by Justices Young, Shearing and Rose, filed on September 15, 1995, which declares certain judgments and orders of this court to be "void," is hereby adjudged to be a nullity and of no legal force or effect.

2. Any attempts by the dissenting Justice Shearing or by the disqualified Justices Young and Rose, by way of "administrative conference" or otherwise, to "terminate" the existence of the Whitehead court, as constitutionally empaneled in this case under Article 6, Section 4 of the Nevada Constitution, are clearly beyond the authority of the mentioned justices, individually or as a group of three, and such attempts must be and will be ignored by the court as it is presently legally and constitutionally empaneled.

3. The order of September 1, 1995, appointing Herbert Ahlswede as special master, remains in full force and effect as it was at the time of its filing.

/s/ STEFFEN, C.J.

/s/ SPRINGER, J.

/s/ ZENOFF, Sr. J.[1]

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[1] The Honorable Thomas L. Steffen, Chief Justice, who was then Vice-Chief Justice, assigned the Honorable David Zenoff Senior Justice, to sit in the place of the Honorable Robert E. Rose, Justice, who was then

[Filed Sep. 15, 1995]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

ADKT 221

PETITION FOR AN ORDER
RESCINDING APPOINTMENT OF SPECIAL
MASTER ENTERED SEPTEMBER 1, 1995,
AND VOIDING ASSOCIATED EXPENSES

ORDER GRANTING PETITION AND
VACATING ORDER APPOINTING SPECIAL MASTER

On September 7, 1995, the undersigned petitioned the elected justices of this court to review actions taken by a panel constituted to hear and decide the matter of Whitehead vs. Nevada Commission on Judicial Discipline, Docket No. 24598. Our petition was prompted by the panel's issuance of an order, signed by only two of the elected justices of this court, appointing a special master/prosecutor, and directing the expenditure of public funds to facilitate the special master/ prosecutor's activities. This order was entered by a majority of the panel constituted to heal and decide only the Whitehead matter. Because the order exceeds the panel's jurisdiction to decide the case before it and purports to authorize the expenditure of public funds, we are compelled to act in our

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Chief Justice. Nev. Const., art 6 § 19; SCR 10.

administrative capacity to protect this court's resources and to govern the programs pursued by the court.

The administration of this court and the utilization of court resources must be authorized by at least three of the five elected Supreme Court Justices, i.e., a majority of this court. SCR 7(1); SCR 7(4). Any administrative action is null and void if a majority of the court disagrees with it. SCR 7(8). The Whitehead court issued its final decision in this matter on September 9, 1994. See Whitehead v. Comm'n on Jud. Discipline, 111 Nev. 70, 893 P.2d 866 n.l (Adv. Opn. 11, February 24, 1995). The "order Appointing Special Master," was entered one year after entry of judgment in that matter Win the hope that effective measures will eventuate that will help to avoid future unwarranted degradation and erosion of the independence of the court and of the judicial system as a whole." (Emphasis in the original.) The undersigned a majority of the duly elected Supreme Court Justices, determine that the appointment of a special master/prosecutor and concomitant expenditure of funds serves no legitimate purpose and amounts to a gross waste of this court's limited resources We therefore declare void the "Order Appointing Special Master" entered in Docket No 24598, and hereby prohibit the payment of any cost or expenditure associated with the appointment of said special master/prosecutor.

It is so ORDERED.

/s/ YOUNG, V.C.J.

/s/ SHEARING, J.

/s/ ROSE, J.

[CONFIDENTIAL]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Case No. 24598

IN RE PETITION FOR A WRIT OF
PROHIBITION OR IN THE ALTERNATIVE
FOR A WRIT OF MANDAMUS

THE HONORABLE JERRY CARR WHITEHEAD,
Petitioner,

vs.

NEVADA COMMISSION OF [sic] JUDICIAL
DISCIPLINE,
Respondent.

MASTER'S INTERIM REPORT

Pursuant to an order entered by the above-entitled court September 1, 1995, appointing Herbert F. Ahlswede Special Master of the Whitehead court, and requiring him from time-to-time to file interim reports with the Whitehead panel concerning his investigation, the following report is hereby submitted:

1. My investigation discloses what appears to have been an intentional and knowing disclosure of confidential matters relating to the Whitehead matter before the Judicial Discipline Commission.

2. My investigation to date reveals that this disclosure may involve members of a law firm, at least two members of the supreme court and the attorney general's office. My investigation, to date, does not point to the involvement of any members of the Discipline Commission, but I do not foreclose the possibility of this being the case should my investigation be permitted to continue.

3. The evidence gathered to date discloses a flurry of communication among those aforementioned persons and those involved in the confidential breach at and around the time of the first "leak," October 10, 1993, when "unnamed sources" were reported to have revealed the confidential files relating to Judge Whitehead to an investigative reporter for a Las Vegas newspaper. The evidence, in the form of communications by FAX and telephone and telephone messages, reveals that possibly at least one member of the supreme court, presently unidentified members of the attorney general's office who were FAXing Whitehead materials to the law firm, members of the law firm, an investigative reporter for the Las Vegas newspaper, a reporter for a Reno newspaper, and an attorney who was representing the Discipline Commission, were involved in a conspiracy to unlawfully leak confidential information concerning the Whitehead investigation by the Discipline Commission.

4. My investigation discloses that evidence of the aforementioned communications, i.e. the telephone FAX records and telephone messages, were ordered destroyed at a time when it appeared that these records might be discoverable in any subsequent investigation into the source of the leaks. Notwithstanding the destruction order, those documents have

been obtained. They appear related to the leak of confidential information.

5. I have also been made aware of a letter from a former member of the Attorney General's office indicating that the Attorney General told an assemblage of her deputies (including the author of the mentioned letter, in her Las Vegas Office, that "[Senior Justice] Zenoff's appointment [to the Whitehead panel] proved that 'the fix was in.'" I can think of no more serious charge than that of a "fixed" court. Certainly, if the statement was made by the Attorney General, and it had any substance, she had the absolute duty to prosecute any so-called "fixed" members of the supreme court. The making of such a statement by the Attorney General and her reasons for making such a statement should be fully explored.

Please keep in mind that this is only an interim report and not a final one. My investigation had just begun when Justices Young, Rose and Shearing ordered it terminated, before any conclusionary or final report could be submitted.

Because my investigation is not complete and because I still harbor some hope that I might be allowed to continue in the search for truth, I offer to the court the present, necessarily incomplete report, which has not included the names of those persons who may be involved.

My investigation cannot be considered any where near complete until I complete my intended work, which includes at minimum, the following:

1. Taking the deposition of certain clerical personnel and lawyers of the law firm involved.

2. Ascertaining who was faxing papers from the attorney general's office to the offices of the law firm involved.

3. Taking the deposition of all supreme court justices and some district court judges.

4. Examination of various involved law firm's records, including, at minimum, inspection of the computers used in the writing of documents and memoranda relating to the Whitehead case.

5. Examination of Supreme Court telephone and fax records

6. A potential request for a federal inquiry into the influence that certain members of the law firm claim to have over a high federal prosecutorial official and of a mentioned FBI agent.

At the time that Justices Young, Rose and Shearing signed the order purporting to terminate my authority, my next intended order of business was to interview all five of the supreme court justices. It was a matter of shock and outrage to me when I found that two of the justices who had signed the order were disqualified to act in the matter in which I had been employed.

Recently, the same three justices (two of whom have been legally disqualified to act in any manner in the Whitehead case) have announced their intention to sign another three-justice order which would terminate entirely ongoing proceedings in a pending case. I realize that the three justices believe that the "time has come and gone" for the existence of the legally constituted panel in the Whitehead case. Nevertheless, it is beyond my understanding how this case can be extinguished by a stroke of the pen, particularly when it is the pen of jurists who are legally disqualified to act in this case.

I dread to think of the precedent that this action takes, for I assume, in the future, any time that three elected justices

deem the manner in which a panel handling a case is unsatisfactory to them, they will try again to wipe it out of existence.

Respectfully submitted,

/s/ HERBERT F. AHLSWEDE
Special Master

SPRINGER, J. concurring:

I concur in the judgment of the court and point out that there are clearly a number of irrefutable legal reasons why two disqualified justices cannot be allowed to intervene in a case through the guise of an "administrative conference" and start canceling out the decisions made in a case and controversy in which they were disqualified to sit. I will supply these legal reasons later, but at the outset I want to stress only the common sense aspects of this case, for I am confident that any reader of this opinion, lawyer or layperson, will understand, before I write another word, that a case duly decided by this court cannot properly be reversed or set aside by any combination of dissenting and disqualified justices who claim jurisdiction simply by changing their roles from judicial to administrative.

By way of simple illustration, consider a hypothetical case decided by a district judge who later discovers that his predecessor, who was expressly disqualified in the same case, had signed and filed in that case an "administrative order" declaring the judgment entered by the duly-appointed successor judge to be "void". It seems odd to contemplate any judge engaging in such untoward conduct, but the fact of the matter is that we are now faced with similar conduct being engaged in by three members of this court.

I think of a number of supreme court cases that have been decided by a panel of five jurists in which two of the panel members are district judges who have been constitutionally designated to "sit in the place" of disqualified justices. If these three justices were now permitted to set aside the judgments of this court merely by signing an in-chambers, "administrative" order, dissenters in any case could simply join with the disqualified justices in an "administrative conference" and overrule any case and controversy that was not to their liking. Thus, if the actions taken by the three justices in this matter are allowed to stand, any future decision of the court

in which jurists were substituted for disqualified supreme court justices is in jeopardy. Such an action would disregard stare decisis and predictability in the law, and any case or controversy decided by a duly-constituted panel of this court would be subject to an overruling by a majority of three assembled in an "administrative conference" set at their pleasure. The rule of law would thus, in such cases, be supplanted by the preferences of disqualified jurists who, in the exercise of raw power could overrule decided cases at will.

In the above example of a district judge discovering that a previously-disqualified judge had filed an order superseding the lawful judgment of the court and declaring the court's judgment "void," there would at least be a remedy--the supreme court would, posthaste, cancel out such an attempt by a disqualified judge to reverse a legal decision of the court. There is, unfortunately, no one to appeal to when justices of the supreme court act in this way.

There is, of course, absolutely no legal basis for the action taken by Justices Young, Rose and Shearing. In addition to the invalidity of the subject order based on the disqualifications of Justices Young and Rose to sit in the Whitehead case, as noted previously, the "order" has denied notice and the opportunity to be heard to Petitioner Whitehead and the Commission. The fugitive "order" is also in violation of established court rules. Finally, and very importantly, at least one of the three justices is the subject of the Special Master's inquiry.

At this juncture, I think it is important for the reader to understand more fully the actions of this court which the three justices seek to declare "void." It should first be said that the decision of the Whitehead court that Justices Young, Rose and Shearing have attempted to declare "void" is the court's duly-entered order of February, 1995, which granted Judge Whitehead's motion to appoint a master. The motion was vigorously opposed and was the subject of oral argument

to the court. The issue decided by the Whitehead court was whether inquiry should be made into the breaches of confidentiality that had been occurring in the Whitehead case. The issue was so serious that even the Nevada District Judges Association wrote an unsolicited letter to then chief justice Rose urging that he take measures to "investigate the source of these [confidentiality] violations of state law and to take whatever steps are necessary to put a stop to the practice."

Article 6, section 21(5), of the Nevada Constitution provides: "The supreme court shall make appropriate rules for: (a) The confidentiality of all proceedings before the commission, except a decision to censure, retire or remove a justice or judge." Following the stated constitutional mandate, this court adopted rules relating to confidentiality, which provide in ARJD 6 that any "person who breaches the confidentiality of judicial discipline proceedings is subject to being found guilty of contempt of the supreme court." Each member of this court has sworn an oath to "support, protect and defend the Constitution of the State of Nevada."

The Commission on Judicial Discipline commenced its activities in 1977. Approximately two years after it came into existence, the Commission began the practice of releasing confidential information relating to judges in a manner that was violative of the Constitution and Commission rules of procedure. These unlawful practices were discontinued in the 1980's but resumed in the 1990's, accompanied by another unlawful practice, that of making secret agreements with judges and imposing secret punishments that were in violation of the constitutional provision quoted above.

I do not understand why the Commission has persisted in violating the Constitution by permitting confidential material to be released to favored press sources and by imposing secret punishments upon judges. Judges who have been the victims of these practices suggest that those responsible for these

unlawful actions believed that they were enhancing their own power by currying favor with certain influential media sources and by holding over the heads of judges the threat of public disgrace if judges resisted too strongly the will of the Commission.

Before Judge Whitehead filed his challenge to illicit Commission practices, the members of this court were already aware of a number of constitutional violations being engaged in by the Commission. In one case, during confidential proceedings relating to a rural judge, the judge became the object of press accounts which alluded to supposed secret sources within the Commission itself. These planted news stories falsely attributed unfounded charges of sexual harassment and other sexual misconduct to a judge. Other comparable misuses of the system had been called to our attention by outraged judges; and, as a result of these revelations, some members of the supreme court became very much concerned about what the Commission was doing.

The constitutional violations that emerged in the Whitehead case (putting confidential Commission files into the hands of a friendly "investigative reporter") were merely the culmination of similar events in the past and inarguably the most brazen and destructive instances in the chain of constitutional violations. The Commission is the legally-designated custodian of these records, and escape of these records was becoming more the rule rather than the exception. It also became apparent that certain reporters, particularly certain members of the Capitol press corps, were more favored than others and that there was, perhaps, an organized scheme to avert constitutional confidentiality provisions entirely.

Judge Whitehead moved this court to appoint a master to investigate violations of his right to confidentiality and other claimed constitutional violations. Records in the Whitehead case revealed not only that confidential information was being

unlawfully planted with favored media outlets, it also disclosed Commission practices in which judges were coerced into making secret "agreements" with the Commission that resulted in the imposition of punishments that were never made known to the public. Notable among these secret punishments was the practice of putting judges on "probation" to the attorney general's office, a practice which resulted in judges having to make rulings in cases where their "probation officer" from the attorney general's office was appearing before them as counsel.

The manner in which the Discipline Commission has been conducting its business presents a very serious threat to the independence of the Nevada judicial system; and it is primarily this concern that prompted this court to institute an inquiry into the practices described above. Contrary to the position taken by certain elements of the media that have been closely involved with the mentioned practices, the purpose of this court's appointing a master is neither to investigate the press nor to exact "vengeance" against anyone for embarrassing the court or its members. I cannot fault responsible members of the press for faithfully and accurately printing contraband material that was delivered to it by persons who were willing to violate the Constitution and laws of this state.

It was the concern of a majority of the Whitehead panel (as it should be for all members of this court) that the mentioned unlawful practices appeared to be carried out in such a way as to degrade the courts, the judges and the Commission itself, and that judges at all levels of our court system were being denied due process of law. Moreover, the public was being denied the open processes of judicial discipline proceedings that the Commission's own rules expressly required.

Returning now to the issue at hand, and although it is certain that under no conditions could the three justices have assumed lawful jurisdiction to overrule any aspect of the Whitehead decisions, very little argument is required to show

that the Judicial Discipline Commission and Judge Whitehead had to have received notice and the opportunity to be heard before the substantial rights of the parties could be altered.

I would not venture to say whether the Discipline Commission would now be in favor of a continued investigation of the violations of law that took place in the Whitehead proceedings; but certainly the Commission should have been given notice and an opportunity to be heard before any action was taken by this court or by any individual justices.

The motion by Judge Whitehead to appoint a special master was granted by four of the five members of the Whitehead court. The judgment has long since been final and is not subject to challenge. The idea that Judge Whitehead could be lawfully deprived of his rights through some kind of ersatz, "administrative" machination, involving two disqualified justices and a dissenting justice, is at total odds with any known conception of jurisdiction, fairness and due process.

There is a third reason, aside from the disqualification of Justices Young and Rose and the due process considerations discussed above, why the three justices should not be allowed to thwart the investigation commenced by Special Master Herbert Ahlswede. The reason is that evidence gathered in the Master's preliminary investigation by the Special Master (before Justices Young, Rose and Shearing stopped him) points reliably to the possibility that at least one of the justices who signed the order may be involved in the breaches of confidentiality which are the subject matter of the investigation. In other words, it appears as though some of the justices may possibly be trying to put a stop to an investigation in which they themselves might be the targets.[1]

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[1] It is noteworthy that in her dissent in this case, Justice Shearing wrote that "there is evidence that some of the [unlawful] disclosures may have come . . . from the court itself. (Emphasis furnished.)

Although Justices Young, Rose and Shearing have signed an order purporting to put a stop to Mr. Ahlswede's investigational activities, Mr. Ahlswede did have time, before the justices were able to thwart the investigation, to gather some vital documentary evidence and take some witness statements. From the information provided by Mr. Ahlswede to the Chief Justice, it can now be said with confidence that the investigation was clearly on its way to the discovery of information that would be of exceptional interest to the judiciary and to the public. It is now established beyond question that the Special Master's investigation was anything but an unfounded "witch hunt," as it has been described by Justices Young and Rose. Among other significant discoveries by the Special Master, the identity of some of the persons responsible for the breaches of confidentiality have been discovered, and there is every promise of discovering all of the persons who engaged in what appears from presently available data to have been a deliberate conspiracy by a number of persons to violate the constitution and laws of this state.

Because the Special Master's investigation is not complete and could be impeded by a premature release of the identity of any of the persons being investigated by the Special Master, I say no more about the investigation at this juncture. Suffice it to say for present purposes that two of the three justices who signed the September 1 order were themselves the subject of the investigation that these justices have ordered to be stopped. Even if these justices had had the authority to intervene in this case and the power to countermand the orders and decisions of this court, it would be a clear conflict of interest for them to order the cover-up and stoppage of an inquiry which tragically appears to involve one or more of the justices themselves.[2]

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[2] It should be noted that as independent grounds (in addition to the jurisdictional, disqualification, due process and conflict of interest reasons)

In conclusion, then, because: (1) Justices Young, Rose and Shearing have no jurisdiction to set aside the rulings of this case; (2) Justices Young and Rose are disqualified to act in any way that relates to this case; (3) the "order" declaring decisions of the Whitehead court in this matter void constitutes a clear denial of due process to the parties to this litigation; and (4) actual conflicts of interest prevent Justices Young, Rose and Shearing from acting in any way that would thwart the Special Master's investigation, I concur in the judgment of the court.

/s/ SPRINGER, J.

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for setting aside the subject order of September 15, 1995, Justice Rose (who was chief justice during the pendency of the Whitehead case) and Justice Young (who was and is Vice Chief Justice during the pendency of the Whitehead case) are precluded from taking any action that relates to the Whitehead matter by SCR 7(5) which provides: "In the event the Chief Justice or the Vice Chief Justice is either disqualified or wishes to recuse himself in regard to the decision of any litigated matter, he is also precluded from undertaking any administrative action with regard thereto. (Emphasis added.)

Further, NRS 2.140 provides that the transaction of judicial business of the supreme court requires "the concurrence of three justices who heard the argument." Justices Young and Rose, disqualified from the Whitehead case, obviously are not justices "who heard the argument" in the Whitehead matter; therefore they are barred by NRS 2.140 from transacting any business relating to that case.

EXHIBIT E

LAW OFFICES OF
JAMES E. WILSON, JR.
301 W. FOURTH STREET
CARSON CITY, NV 89703

(702) 882-9211
FAX: (702) 883-5827

January 10, 1994

Sherman Frederick, Publisher
Las Vegas Review-Journal
1111 West Bonanza Road
Las Vegas, NV 89106

Dear Mr. Frederick:

This letter is directed to you on behalf of two justices of the Nevada Supreme Court, Charles E. Springer and Thomas L. Steffen. The purpose of this letter is to demand, pursuant to NRS 41.336, that you correct the libelous statements about the named justices published in your newspaper and which I shall hereafter identify at least in part.

Before going into specific instances of defamation, permit me to give you a summary of my position:

1. Legal precedent and court rule (Administrative and Procedural Rule 40(7)) permit and expressly authorize a judge or the Commission to seek the kind of judicial review now being sought by the judge in the Supreme Court.

2. That the reviewing court should hold administrative proceedings of the Discipline Commission in abeyance until judicial

review is completed is the proper, ordinary and accepted manner of proceeding in cases such as this.

3. That the Supreme Court and the Commission had the constitutional and legal duty to keep these judicial discipline proceedings confidential, at least until after probable cause for disciplinary charges was established, is not a matter that can be seriously challenged.

4. A majority of this court (Justices Rose, Steffen and Springer) were acting in complete accordance with the law and the Nevada Constitution when they:

a. ordered the Commission not to proceed until the judicial review of the Commission's jurisdiction was completed.

b. ordered that all proceedings be confidential.

5. The preliminary ordered signed by Justices Steffen and Springer and referred to in your articles and editorials were procedural and non-final in nature. These orders were later ratified or allowed to stand by a majority of the court.

6. Any statement, implication or innuendo that insinuates any impropriety or irregularity into the judicial acts performed by Justices Springer or Steffen is necessarily and indisputably false and incorrect. Not only have Justices Steffen and Springer not wrongfully "interfered" with the judicial discipline process,

to date everything they have done was commanded by the Nevada Constitution and law--they had no choice and were doing what they had to do under the circumstances.

7. Undeniably, the "picture" drawn by your newspaper of Justices Steffen and Springer over the past three months can be summarized in this way:

Justices Steffen and Justice Springer are corrupt judges who have abused their judicial trust and have violated the law and the Nevada Constitution by wrongfully and "secretly" thrusting themselves into the lawful proceedings of the Judicial Discipline Commission and by engaging in unethical "favoritism" to prevent a powerful "crony" from receiving his just and due punishment for judicial misconduct.

8. The statements made by the Review-Journal and the overall picture drawn by the Review-Journal are false, defamatory and malicious. It is these falsehoods and these false portrayals of Justice Steffen and Justice Springer that we demand be corrected.

Beginning on October 10, 1993, in an article bearing the headline "State Supreme Court secretly halts probe of Washoe judge," and continuing on through the end of 1993, your newspaper has carried an intensive series of articles and editorials which defame and place in a false light justices of the Nevada Supreme Court, Charles E. Springer and Thomas L. Steffen. Left for another time is the subject of the damage your newspaper and its secret sources have done to the Nevada Supreme Court, the judiciary in general, and the judicial process with respect to the subject of your reporting and editorializing.

On behalf of the justices, I demand correction of the following statements, but emphasize that this demand is not to be construed as and "all or nothing" demand. In other words, we demand a correction on each of the following statements and leave to you and your counsel the responsibility of deciding which of the statements you will be willing to correct.

1. "The press association plans to file a complaint over a secret ruling halting a hearing against a judge." "The Nevada Press Association plans to file a complaint challenging a secret state Supreme Court ruling that halted a disciplinary hearing against a Reno judge." "The complaint will be filed with the state Judicial Discipline Commission which was prevented from holding hearings on Washoe County District Judge Jerry Whitehead." "Two justices recently intervened in the Judicial Discipline Commission's attempt to hold a probable cause hearing on complaints about Whitehead." "When Rose left town briefly, sources said, Steffen and Springer promptly removed Whitehead's hearing from the docket." "'The behavior by two out of the four justices involved in this is certainly unethical and highly questionable,' said Ande Engleman, executive director of the Nevada Press Association." "She criticized the actions by Steffen and Springer. 'There are five members of the court,' she said. 'Two constitute a minority. To wait for one to leave town, so they could have a majority of two, certainly circumvents the spirit of majority rule.'" Article by A.D. Hopkins published in the R-J on October 12, 1993.

> Comment: This article demonstrates that Engleman's later attempts to explain that her complaint to the Judicial Discipline Commission (hereafter Commission) against Steffen and Springer on behalf of the Nevada Press Association was a "typographical error" was absurd, as under no accepted definition could "on behalf of the Nevada Press Association" be

a "typographical error." This article would have your readers believe the "two justices" intervened, thereby making it appear that the two subject justices were able to, and did in fact, frustrate majority rule on the court. You also failed to note that the order was signed by three justices. This was the beginning of an obvious attempt to both malign and defame these two justices and to influence the voting among the members of the court. Engleman's statement that the behavior of "two of the four justices" (meaning only Steffen and Springer despite the known fact that three justices signed the stay order) "is certainly unethical," which statement was republished by the R-J, is libelous, malicious and false, as are the statements indicating that they "waited" for Rose to leave so that they could remove Whitehead's hearing from the docket. The article also falsely conveys the unmistakable impression that two justices could remove a hearing from the court calendar and that a majority of the court could do nothing about it.

2. "A hearing into allegations against Whitehead, scheduled for September by the Nevada Commission on Judicial Discipline, has been thwarted by a secret order of the Nevada Supreme Court." "He [Steffen] wasn't talking about the issue. He was trying to make the attorney [Richard Young] look like a fool." "From the questions, you could tell he [Steffen] had information that nobody else had. It wasn't part of the record, but he'd [Steffen] say, 'Didn't you say this in chambers to Judge Whitehead?' and Young would say, 'I did not.' Well, how would Steffen have that information except by talking to Whitehead?" "Justice Cliff Young (no relation to the lawyer representing the mother) recused himself, because he was once Whitehead's law partner. Steffen, however, remained on the case and participated in

granting controversial orders delaying the discipline commission's investigation indefinitely and ordering that Whitehead be given all evidence gathered so far by the commission. Justice Charles Springer joined Steffen in issuing one ruling favorable to Whitehead, while Chief Justice Robert Rose, said to be neutral in the case, was out town." "And given I [Richard Young] just saw Springer and Steffen do in the absence of Justice Rose, one could certainly draw the inference there is a back door to justice in our state." Article by A.D. Hopkins published in the R-J October 14, 1993.

Comment: This article contains false, libelous, and malicious material, and also promotes the agenda of the R-J and its unethical secret sources in seeking to disparage, malign, and defame Justices Springer and Steffen, and convey the impression that those two justices are biased in favor of Whitehead and are thwarting the Commission's work improperly and secretly in order to protect Whitehead. The article also makes factual statements libeling Steffen regarding the Pearson case and his stated ex parte contact with Whitehead in order to obtain information about the Pearson case that "was not in the record." The investigative reporter who wrote and published the libel could have readily determined that references to the in-chambers conference were contained in the publicly-filed briefs of both parties. The mentioned conference was also discussed in the bench members circulated to all justices in preparation for oral argument. The entire effect and purpose of the libel was, it appears, to show that Steffen was unethical and that he wanted, in an improper way, to protect Whitehead. The entire article was calculated to cast Steffen and Springer in a false light and to improperly influence the court in

the Whitehead proceeding. The reference to "backdoor justice" is also false, libelous and malicious. The orchestration of this article also demonstrates malice and the intent to cast Justices Springer and Steffen in a false and bad light.

3. "In that matter [the most controversial decision made in the case], sources said, the court ordered all evidence and the identities of all witnesses turned over to Whitehead." "Sources said Guy joined Justices Thomas Steffen and Charles Springer in agreeing to give the evidence to Whitehead. Rose and Justice Miriam Shearing reportedly opposed it." "The complaint said that two Supreme Court justices violated the law and ethical standards by their secret actions against the discipline commission." Article by A.D. Hopkins published in the R-J on October 15, 1993.

Comment: The article falsely states that District Judge Dell Guy joined with Justices Steffen and Springer in ordering the Commission to give all evidence and identities of witnesses to Whitehead. The article was written in order to cast Justices Steffen and Springer in a false light and to promote the impression that these two justices were acting improperly in order to protect Judge Whitehead. This article by Hopkins was also published in the affiliated Nevada Appeal, and I hereby demand a correction of all matters identified in this letter that were published or republished in the Nevada Appeal, and hold the Nevada Appeal responsible for correcting the same.

4. "After learning of the existence of the motion Friday, Review-Journal Publisher Sherman R. Frederick said, 'This appears to be an attempt to intimidate sources of the

Review-Journal and further hide the actions of the Supreme Court.'" "Justice Thomas Steffen, who has taken the lead in the unusual case . . . ." "On July 22, Steffen signed an order halting all proceedings by the commission in the matter pending the determination of jurisdiction. However, the same order required the commission to turn over to Whitehead a list of all persons contacted in connection with the investigation, and to notify all witnesses ordered to attend a pending probable-cause hearing not to appear. The same document imposed a gag order, removed Whitehead's name from the case and required Bloom to personally maintain custody of the case file." Article by A.D. Hopkins published in the R-J on October 16, 1993.

Comment: The quoted material obviously seeks to place the court, and Steffen in particular, in a false light, implying that Steffen had foisted secret orders on the court that have wrongfully interfered with the Commission. The article deliberately omits reference to the fact that the single-judge order of July 22 was later reaffirmed by the three members of the court (Rose, Steffen and Springer) in all respects other than the discovery segment of the order, which was withdrawn subject to the further order of the court. The statement that Steffen has somehow "taken the lead" in the case is also false and intended to influence the court in its disposition of the proceeding. The R-J has repeatedly, including in this article, attempted to falsely influence its readers into believing that one or two members of the court, Steffen and/or Springer, have managed to secure control of the Whitehead proceeding with the intent to improperly and "secretly" protect Judge Whitehead.

5. "Those who can blind us, gag us and make us deaf can lead us like sheep to be shorn." "Then they thumb their noses at you." ". . . when out of the blue Justices Thomas Steffen and Charles Springer interceded. They halted proceedings, sealed every record in sight and gagged everybody who knew anything. They even stripped the name of the judge from the case file and told the discipline panel to reveal all of its witnesses to the accused judge. There is no reason for the high court to hear cases in secret, yet Steffen blithely commented in classic Orwellian newspeak, 'No such case has any public existence. You are talking about a subject that if it exists, there is no honorable way that I can indicate to you that any such case exists.'" "The actions of this court bring to mind works like travesty, Star Chamber, good ol' boy system, unconstitutional and prior restraint. In the face of all this, not a single lawyer, judge, politician or citizen has risen to declare with their names attached that this is wrong, despicable, reprehensible and utterly obscene." Nobody deemed it significant enough to speak out when a powerful and influential judge is being secretly judged by a small group of cohorts." "Are the legal professionals of this state so afraid of jeopardizing their six-figure salaries that they will sit mute in the face of judicial terrorism and chicanery?" "Any court that whitewashes in secret is as much to be feared as one that tries, convicts, sentences and executes in secret. Are we a state ruled by principles and laws or one subject to favoritism and back-room deals about which the uninitiated need not be bothered? Back-door justice is no justice at all." Editorial by Thomas Mitchell published in the R-J on October 17, 1993.

Comment: This false and malicious editorial represents a clearly unwarranted assault on the judicial branch of government. More to the point of this letter, it again seeks to convince its readers that two justices, Steffen and Springer, have managed to take over the court and prevail against two other justices and a district court judge in creating a secret

proceeding to protect a crony judge from the Commission. This editorial will one day be shown to have been "wrong, despicable, reprehensible and utterly obscene," but in the meantime I demand a full, decent, and honest correction of its contents. The Review-Journal and the Nevada Appeal have accused Justices Steffen and Springer of "chicanery," "secretly judging an influential judge," "judicial terrorism," "whitewashing in secret" and "blithely" attempting to conceal that which, despite the Nevada Constitution and rules adopted pursuant thereto, you maintain should have been public. On behalf of the two justices, I demand that you publish a complete and honorable correction of this false and irresponsible "editorial."

6. On October 19, 1993, the R-J published a "cartoon" depicting "Justice" as a woman who has lost her virtue to a "secret affair with a Nevada Supreme Court Justice."

Comment: This "cartoon" is obviously intended to apply to either Justice Steffen or Justice Springer. It is false, malicious and libelous. It is clearly designed to cast Justices Steffen and Springer in a false light.

7. "But in this case, as though that weren't secrecy enough, the Nevada Supreme Court stepped in and high-handedly wrestled the investigation away from the discipline commission, sealing its records. Whereupon the Supreme Court ordered the Judicial Discipline Commission to tell Judge Whitehead the names of everyone who had spoken to it." "The larger issue is the monstrous miscalculation the judiciary makes when it assumes the best way to maintain the public's confidence is to cover up any allegations of wrongdoing among

its number." "How long will it be before defendants are swept off the streets and subjected to secret trials -- 'disappeared' into the justice system? The people running our courts clearly would have no objection to such proceedings on principle. Maybe they're just waiting until they think they can get away with it." Editorial published in the R-J October 27, 1993.

> Comment: Taken in the context of all previous articles and editorials, it is clear that the R-J is again seeking to convince its readers that Justices Steffen and Springer have attempted to "cover up" the wrongdoing of a favored judge, and that these two justices are just waiting for the opportunity to implement their will on any or all legal matters in secret. I am truly alarmed to read such false malicious, irresponsible disinformation the R-J and its unethical secret sources have peddled to the citizens of this state. Justices Steffen and Springer are entitled to a meaningful and honest correction, and on their behalf I demand the same.

8. "On July 22 Justice Thomas Steffen signed an order halting the commission's proceedings until a hearing could be held on Whitehead's petition. He also ordered the commission to show under what authority it had sought out witnesses who had not themselves filed complaints with the commission." "The Steffen document also imposed a gag order, prohibiting members of the commission from mentioning the fact that a hearing on Whitehead's petition was pending in the Supreme Court. It ordered the clerk of the court, Janette Bloom, to maintain all relevant documents in a secret file. The Supreme Court hearing was scheduled for October 4. But when Chief Justice Robert Rose briefly left the state in September, Steffen and Justice Charles Springer canceled the hearing. Justice Miriam Shearing reportedly opposed the

cancellation." Article by A.D. Hopkins published in the R-J on October 29, 1993.

> Comment: This appears to me to be another blatant attempt to "poison the well" and create a public animus against Justices Steffen and Springer by making it appear that they are in control of the court and have either single-handedly (with Steffen) or between the two of them, wrongfully halted and frustrated the work of the Commission and imposed "secrecy" on the proceedings that cannot be justified under the law. Note that this continues to be the overriding theme adopted by the R-J from the very beginning in order to cast Steffen and Springer in a false and unfavorable light and to convey the impression that the two justices are unethical, corrupt, and willing to sacrifice the law and their responsibilities under the law to protect a crony judge. The article seeks to convince its readers that Steffen and Springer waited to find a time that Rose was gone so that they could "cancel" the Whitehead hearing. This again falsely implies that Justices Steffen and Springer have managed to stymie a majority of the court, who were somehow rendered incapable of rescheduling the hearing. Moreover, it fails to recognize that the justices of the Supreme Court routinely accord even criminal defendants charged with the most heinous crimes continuances which are sought to enable them to fully prepare to properly defend themselves.

9. "The Judicial Discipline Commission itself appears to be blocked from talking to the witnesses by an order signed by Justice Thomas Steffen. Steffen also ordered that any witnesses called for probable-cause hearing, which the

commission had already scheduled, be notified not to appear pending further notice. But his order also prohibited the commission from continuing the proceeding in any other respect, pending a hearing in the Supreme Court on Whitehead's petition challenging the commission's authority to investigate certain allegations against him. Although Steffen signed the order on July 22, a Supreme Court hearing was later vacated, and sources say it has not been rescheduled." "The state Supreme Court has ordered the commission to turn over to Whitehead the names of all potential witnesses, which he would need to present defensive evidence if a probable-cause hearing is ever held." Article by A.D. Hopkins published in the R-J on October 30, 1993.

> Comment: This another repetitive attempt to deliberately mislead the R-J's readers and to cast Steffen, individually, and Steffen and Springer as members of the court in a false light. It is also calculated to interfere with the processes of the court. Despite knowledge to the contrary, Hopkins would have his audience believe (and also the readers of other newspapers who repeat the misinformation) that Steffen's original order of July 22 was the ongoing source of staying the Commission's efforts to discipline a judge whom these two justices are accused by your paper of unethically striving to protect. Hopkins knew, but apparently deliberately disregarded, the fact that the Commission asked the full court to review and vacate the July 22 order, and that the initial order was reaffirmed in all but one aspect (which relieved the Commission of the discovery aspect of the initial order until further order of the court) by three justices, Rose, Steffen and Springer, in an order filed July 30, 1993. The July 30 order continued the stay and the requirement of confidentiality in the proceed-

ings. Hopkins and the R-J knew that as of July 30, the Commission was not "blocked" or affected in any way by the initial order of July 22 since it had been superseded by the three-judge order of July 30.

10. "'This episode is not calculated to improve it. There is a real problem of self-dealing when judges, sitting on any court, prevent a constitutional body from doing its job of overseeing judges.'" "'Particularly distasteful, Rotunda said, was the gag order, imposed by Justice Thomas Steffen, forbidding the Nevada Commission on Judicial Discipline and its lawyers from even mentioning the existence of the case. That does not promote confidence,' said Rotunda. 'It is not calculated to make people believe those things done in secret are also done properly.'" "He [Hazard] added, 'I find it difficult to believe that a court honestly interested in proper procedure could have reached such a conclusion.'" "If in fact these names are supposed to be confidential, it is pretty bad for them to use this indirect way of providing this information to the judge,' said Wolfram. 'It is highly improper.'" "She also said the Supreme Court action sidesteps Nevada's Constitution. 'There was a clear intent by whoever drafted your constitution that the discipline commission be independent of the court. And for the court to step in and interfere with that process is very disturbing. And here, the very fact they are doing it is mired in secrecy.'" Article by A.D. Hopkins published in the R-J October 31, 1993.

Comment: The R-J admits supplying the professors mentioned in this article with "certain documents" and "Review-Journal stories on it." These ethicists were spoon-fed documents and R-J stories deliberately designed to cast Justices Steffen and Springer in a false light. The ethicists were poisoned by one-sided stories that will not withstand objective scrutiny. On behalf of my clients, I demand a

complete and honest correction, including whether you or your counsel paid the ethicists to provide opinions based upon the one-sided information you gave them.

11. "Margo Piscevich, a Reno trial attorney and president-elect of the bar's board, said earlier this week, 'I think it's outrageous. It appears to me, and in my opinion, that the Judicial Discipline Commission has been bound, gagged and constitutionally raped. The process as designed is not working. Any person should be able to file a complaint against a judge without fear of reprisals and intimidation. I am not aware of any lawyer who is not disgusted.'" 'But he [James Beasley] is especially concerned with a Supreme Court order, 'which I learn from reading newspapers, was entered by the court, requiring all documentation, affidavits, statements taken in connection with that proceeding to be turned over to attorneys for Judge Whitehead." Article by A.D. Hopkins published in the R-J on November 4, 1993.

Comment: This article is strongly indicative of the extent to which the R-J has gone to libel my two clients, whom the R-J has repeatedly identified as the members of the court who are responsible for the "secret" proceedings. The publication of the false and egregious comments are intended to cast my clients in a false light even to the extent of accusing them of constitutionally "raping" the Commission. Again, the R-J has deliberately perpetuated the false claim that the court has ordered all discovery materials and names of witnesses to be delivered to Whitehead's attorneys.

12. "It would certainly be better than the current self-defeating blanket of secrecy, which can only lead to wild and inaccurate speculation on the part of a public told it is not

to know even the charges -- let alone the verdict -- of any investigation into a judge's conduct. How on earth can anyone imagine such cozy secrecy contributes to the public's trust and faith in the integrity of the judiciary?" Editorial published in the R-J on November 7, 1993.

> Comment: The wild and inaccurate "speculation" has existed only because of the false and calculated articles and editorials published by the R-J. At no time has this court indicated that any final results of its review of the petition would be "secret" and it is equally false to suggest that this court has done anything to foster the false notion that any "verdict" concerning the petitioning judge's conduct would be kept either "secret" or "cozily secret." This is another attempt to cast my clients in a false light.

13. "The time has come for Judge Whitehead, and that minority on the state Supreme Court who would apparently block this inquiry on the most slender of pretenses, to recall that all jurists accept an obligation to a cause higher than their own careers when they ascend to this position of public trust. The Nevada public teeters near the brink of concluding there is no justice for anyone who reports judicial misconduct in this state, no matter how egregious the allegation, so long as the judge in question shares both friendship and political ambition with at least two justices of the high court. Faith in the bedrock integrity of the court system is at risk. Unless Judge Whitehead himself sees fit to stop the fandango and allow this inquiry to proceed, the high court justices should remand this matter to a Judicial Discipline Commission which has demonstrated exemplary courage and fairness to date, and publicly commit themselves to abide by its decision." Editorial published in the R-J on November 18, 1993

Comment: This false and malicious editorial does correctly indicate the enormity of the damages inflicted upon my two clients in particular and the court system in general when it states that the public (who knows only what the R-J and its unethical secret sources have published to the citizens of this state) "teeters near the brink of concluding there is no justice for anyone who reports judicial misconduct in this state," and that "[f]aith in the bedrock integrity of the court system is at risk." Although time will reveal in startling fashion the extent of the R-J's malicious irresponsibility, I now demand a complete correction in this "editorial" with its accusation that a minority (my two clients) have blocked the investigation and that they have done so "on the most slender pretenses." You have also sought again to cast them in a false light by stating that they should give in to a higher cause (which is precisely what they have done) rather than seek to promote their own careers. The statement regarding friendship was made in a pejorative sense and the reference to sharing political ambition is both false and malicious. This editorial ends by asking those justices to violate the law and commit themselves publicly to abiding by the decision of the Commission, whatever that may be. This editorial not only libels my clients and seeks to place them in a false light, it represents one more attempt among many by the R-J to interfere with the judicial processes of the court and the voting among its members on a pending matter.

14. "Whitehead case a struggle for the soul of Nevada's jurisprudence system." "The Nevada Supreme Court is locked in a legal struggle between the proponents of fair and

equitable treatment for all under the law, and those who would subvert and pervert the law for their cronies and political allies." Justices Thomas Steffen and Charles Springer have joined forces to wrest the probe away from the discipline panel by embracing a series of rather flimsy and legally questionable rationales." "Where will Judge Guy stand? Will he stand on the side of law? Or will he stand with those who are tempted by power and political ambition? We dare say he will stand with what he believes to be right." "They have sought to remove from the case two sitting justices who opposed them, while ignoring the pending case before the discipline commission concerning the two justices already in their pocket." "And can any of us expect justice from a system so easily corrupted?" Editorial published in the R-J on November 21, 1993.

Comment: This blatant attempt to manipulate the judicial process by creating the appearance that my clients are bedeviling the Commission and the court by "wresting the probe away from the discipline panel" through flimsy legal rationales is both false and oozing with malice. The R-J has once again sought to deceive its readers into believing that these two justices have managed to grasp the insidious role of dictators on the court against the wishes of a majority. Dishonestly, the R-J conceals the fact that the orders staying the Commission until the petition challenging jurisdiction is decided have, since July 30, 1993, been signed by either three justices or two justices and District Judge Dell Guy. The order signed by Judge Guy, previously described by the R-J as the most controversial, requires the Commission to produce investigative materials to the court for an in camera inspection. The statement charging my clients with subverting and perverting the law for their crony is false and

malicious. The entire editorial, filled with false and libelous statements, patently seeks to cast my clients in a false light and to interfere with and influence the court in its disposition of a pending case.

15. "And an equally large story, irrespective of Whitehead's guilt or innocence, is why the Supreme Court, notably Justices Tom Steffen and Charles Springer, is going to such lengths to quash the commission's probe -- actions that have resulted in near-universal opprobrium, understandably in private, from the legal community." "This from the same newspaper with the longstanding, cozy relationship with one E.M. Gunderson, the former chief justice who is an ally of Whitehead and still wields great influence on the court." But, consider this: The paper (R-J) is the only media outlet exploring this clash between the Supreme Court and the commission, the only body in the state with any authority to regulate the high court. By the time the facts become clear -- assuming they ever do -- a public that realizes justice may have taken a vacation from that Taj Mahal in the Capitol courtyard will feel ill." Commentary by Jon Ralston published in the R-J on November 23, 1993.

Comment: This article falsely attributes to Justices Steffen and Springer the "blame" and the power to "quash" the Commission's probe, a proposition which the R-J and its support group must know is false. Mr. Ralston does, however, favor us with his assessment of the "near universal opprobrium" within the legal community which the R-J has single-handedly caused with its false and malicious articles. Notably, the R-J again lauds itself for having collaborated with its secret sources in exposing what it would have its readers believe is the product of two unethical justices trying to protect a crony judge. When the truth

finally surfaces, one must wonder if the R-J will have sufficient integrity to print it. It is also noteworthy that the R-J again attempts to deceive its readers concerning the governmental structure of our state. Nowhere is the Commission given power to "regulate" the Supreme Court or any other court. On behalf of my clients, I demand a full correction of the false and malicious statements contained in this commentary.

16. "A July 22 order from Supreme Court Justice Thomas Steffen halted the discipline procedures pending a Supreme Court hearing on the issues Whitehead raised, but four months later, no hearing has been held, and none is scheduled." Article by A.D. Hopkins published in the R-J on November 25, 1993.

Comment: This is yet another attempt to deceive the R-J's readers, and other news sources, into believing that Justice Steffen's perfectly proper order of July 22, 1993, has somehow managed to be the obstacle to the Whitehead matter being returned to the Commission. The R-J has deliberately sought to defame and malign Justices Steffen and Springer in order to accomplish its improper objectives and to influence the court's disposition of the matter that has been thoroughly poisoned by the irresponsible "reporting" of this newspaper. The R-J has long had actual knowledge that a three-judge order has been the source of staying the Commission's proceedings since July 30, 1993. I demand that you forthrightly reveal your motive in your ongoing efforts to decive Nevadans with your deliberate distortion of these proceedings.

17. "Two Nevada Supreme Court justices may have violated five ethical canons and four state laws in handling a disciplinary case involving a Washoe County judge. The possible violations are raised in a complaint filed with the State Judicial Discipline Commission in mid-October." "Several legal scholars said that with the filing of the complaint against Steffen and Springer, they should be removed from hearing district Judge Jerry Whitehead's case, because all three jurists are now the subject of Judicial Discipline Commission review." "On July 22, Steffen stayed the commission proceedings pending a Supreme Court hearing on Whitehead's petition. But on Sept. 20, when Whitehead's lawyers complained that the discipline commission was not providing needed documents, Steffen and Springer canceled the court's hearing while leaving the stay order in effect." "Engleman's complaint accuses the justices of breaking the state's open meeting law by entering a secret order and filing a secret case within the Supreme Court. The complaint adds that the justices also may have violated laws against making an agreement to act in an unlawful manner; violated laws against interference with the cause of justice; and violated provisions of the Nevada Constitution, which says the commission had to either dismiss complaints against Whitehead or proceed to the probable cause hearing that the Supreme Court action has so far blocked. The justice's actions also violate five canons of the Nevada Code of Judicial Conduct, the complaint says. It says the two justices' relationship with Whitehead presents at least an appearance of impropriety in violation of Canon 2. That canon also says political relationships must not influence a judge's conduct. The complaint says the justices violated other canons by interfering with the normal course of justice, by failing to uphold standards of integrity, by acting in a manner that casts doubt on a judge's impartiality, and by participating in inappropriate political activities." "Charles Wolfram, a professor at Cornell Law School and author of 'Modern Legal Ethics,' said Engleman's complaint should prompt Springer and Steffen to recuse themselves from the Whitehead case. 'Some of those charges are that they

intervened out of political favoritism. If so, that cannot be appropriate,' Wolfram said." Article by A.D. Hopkins published in the R-J December 1, 1993.

Comment: This article is false and malicious in that the R-J, whose attorney "assisted" Engleman in the preparation of the complaint, has to know that the allegations of the complaint are absurd, false and malicious. Anyone can file a complaint and charge any judge with misconduct. In this case, either Engleman received incredibly bad advice and information, or the complaint was yet another effort by the R-J and its collaborators to falsely smear the reputations of my two clients and manipulate the pending proceedings before the court concerning the Whitehead matter. There is no truth to the allegations of the complaint and no means of ever proving that which does not exist. Judicial proceedings are expressly exempted from the open meeting law by the law itself, and the two justices have been faithful to a fault in obeying the law and the Canons of Judicial Conduct in these proceedings. It doesn't take much imagination to know who and why this attempt to smear these two justices was so maliciously orchestrated. On behalf of my clients, I demand a complete and total correction of this blatant attempt to defame and cast my clients in a false light and to manipulate the panel that will ultimately decide the Whitehead petition.

18. ". . . the eerie inner workings of the Judicial Discipline Commission and the Nevada Supreme Court. If recent articles on the subject aren't astounding you with the complex rhetoric of ethical issues, then they are churning your stomach with the image of an incestuously cozy judicial

system." The article goes on to imply that former Justice E.M. Gunderson is exercising undue influence on members of the court. Article by John L. Smith published in the R-J on December 2, 1993.

> Comment: The false innuendo in this article is clearly intended to imply that my clients are engaged in "incestuously cozy" judicial maneuvering and that they are being influenced by former Justice Gunderson in their handling of the Whitehead proceedings. The articles seeks to cast my clients in a false light as there is no truth to the innuendo or the inferences unmistakenly portrayed in the article. It is again noted that the "churning feeling" in your readers stomachs have been placed there by the carefully planned and malicious attack on the reputations of my clients. I demand a complete and total correction.

19. The "cartoon" depicting "judicial ethics" taking a bath and a dark figure (represented to be the Nevada Supreme Court) with a huge knife ready to be plunged in the back of "judicial ethics" obviously is a takeoff on the movie "Psycho." This piece of work appeared in the R-J on December 5, 1993.

> Comment: This "work" receives an "A" grade for imagination and an "F" for portraying a false and malicious caricature of the court in general and, based on the repetitious libel appearing in the R-J against my clients, Justices Steffen and Springer in particular. This is perhaps a perfect portrait of the malice with which the R-J has repeatedly defamed and smeared these two justices. I demand a complete and total correction.

20. "Justice Thomas Steffen in July stayed proceedings pending Supreme Court hearing on the issues Whitehead raised . . . . " Article by A.D. Hopkins published in the R-J on December 9, 1993.

Comment: This is another deliberate attempt to mislead R-J readers into believing that Justice Steffen has effectively, and single-handedly, stayed the judicial proceedings involving the Commission and Judge Whitehead. Mr. Hopkins had known for months that three judges stayed the Commission proceedings pursuant to law on July 30, 1993. This attempt at casting Justice Steffen in a false light, contrary to actual knowledge in the possession of the writer, must be corrected.

21. "The corruption of the state judicial discipline process in the Whitehead case started out with an Orwellian flavor. (The law says what we say it says because we wrote it and can interpret it as we see fit.) It soured to Kafkaesque. (You can use the same argument today as you have in the past but reach a totally different conclusion.) Now it has disappeared entirely down Lewis Carroll's rabbit hole." "In fact, the case was following the 'due process' course through the Judicial Discipline Commission until Whitehead's cronies on the Supreme Court derailed it." Editorial published in the R-J on December 15, 1993.

Comment: This is still another attempt to maliciously defame my clients and cast them in a false light. Of course, in keeping with numerous other false and libelous articles and editorials in the R-J, the R-J would have its readers believe that Justices Steffen and Springer are "Whitehead's cronies" and that the two of them have somehow managed to circumvent majority rule on the court and

thwart the proceedings of the Commission against Whitehead. This editorial is false and malicious and I demand that it be fully and fairly corrected.

Perhaps never before in the history of this state has there been such a dedicated conspiracy between a newspaper and unethical secret "sources" engaged to achieve the destruction of specific members of the judiciary and to persuade Nevada citizens that justice has been sold for "cronyism" and corrupt political gain. The damage to the court as an institution is incalculable and irreparable, as is the interference in a pending case. From a taxpayer's standpoint, you and your secret collaborators have cost the citizens of this state an enormous loss in the form of wasted effort, time, resources, and human energy in attempting to deal with the irresponsible, false, and unrelenting disinformation you have caused to be spread like a cancer throughout this state.

You have falsely, recklessly, wrongfully, and maliciously defamed and libeled my clients repeatedly on the pages of your newspaper, and have caused other newspapers to publish the irresponsible and false libel appearing in your paper. You have forced them to divert their efforts from "genuine" issues, to the problems you have created both for my clients and the court as a whole. You have inflicted untold damage upon the reputations of Justices Steffen and Springer, and have created great anguish to my clients and their families without <u>any just cause whatsoever</u>. You have also siphoned much of their energy to the task of determining how to deal with such a malign, irresponsible combination. In short, you have truly indicated part of the enormity of the damages inflicted upon my clients by you when you said that the "Nevada public teeters near the brink of concluding there is no justice for anyone who reports judicial misconduct in this state" and that Justice Steffen's and Justice Springer's actions "have resulted in near-universal opprobrium for the legal community." I remind you by way of emphasis that <u>all</u> of the

damage and injury suffered by my clients is traceable exclusively to you and that a "campaign" of correction no less conspicuous and ongoing than your "campaign" to defame, sully, and destroy, will not even begin to counterbalance the extent of the damage and injury you have inflicted upon them.

Fortunately for these two justices and the cause of justice in this state, you severely miscalculated the level of intelligence and integrity within the Board of Bar Governors. You have been condemning my clients mercilessly for their "interference" based upon "flimsy" reasoning, the "most slender of pretenses" and the violation of law and ethics. I have not read where the R-J concluded that the Board of Bar Governors, who quite properly determined that the court's intervention and confidentiality (the two aspects of these proceedings that you have most harshly condemned and attributed to my clients) were proper, did so because of corruption or lack of competence or some vague intimidation by a former Supreme Court Justice. Imagine how the ethicists you and your cronies baited into voicing public opinions concerning the propriety of my clients' actions will feel when they realize that they were spoon-fed spoiled and tainted morsels upon which to base their conclusions.

You have boasted that you were able to secure and publish information about "secret" proceedings unlawfully adopted by these two justices. You have wrongfully and maliciously castigated my clients for doing what is required of them by the Nevada Constitution and the Commission's rules. You have sought to manipulate and influence the disposition of the matter inside the court and you have irresponsibily and vastly complicated the nature of the proceeding before the court and greatly delayed the time of its resolution. You and your valued "secret sources" must bear the full responsibility for your course of conduct. Although my clients and I demand a full and honest correction of the malicious, scandalous, false, and libelous statements

published in the R-J, we will not hold our breath anticipating fairness or decency from you or your group.

Perhaps the most ludicrous and hollow of your reporting or editorializing occurred in an editorial written by Thomas Mitchell and appearing in the R-J on October 31, 1993, when he said: "[W]e are fully aware that our stock-in-trade consists of accurate and fair news reporting, exhaustive information . . . and untainted commentary." My clients fervently hope that before this entire quagmire, which you and your sources alone have created, is purged of its toxins, some responsible national media group will condemn the R-J for the terrible disservice it has provided to the government, citizens, and certain judges of this state by reason of its frenzied and irresponsible "reporting" in this entire matter. Indeed, the "frenzy" reached a bizarre crescendo when the R-J turned on other newspapers for refusing to join in its strident demands for a lynching. Thankfully, the R-J also miscalculated the depth of integrity and intestinal fortitude within the Nevada Press Association, which has taken a responsible "wait and see" approach to the entire matter.

I trust that someone in your organization may realize the enormous damage you have caused to my clients with no just cause either in fact or in law. If so, I trust that reason will prevail and you will take full measures to prominently correct all of the numerous false statements, insults, and false innuendo you have so deliberately planned and published concerning them. In any event, pursuant to NRS 41.336, I demand on behalf of my clients that you do so.

Resolutely,

/s/ JAMES E. WILSON, JR.
Attorney at Law

EXHIBIT F

WHERE I STAND
Las Vegas Sun
Sunday, August 13, 1995

WHEN MEDIA AND JUSTICE COLLIDE

THOMAS STEFFEN IS CHIEF JUSTICE OF THE NEVADA SUPREME COURT. IN TODAY'S GUEST COLUMN, HE EXPLAINS WHY HE IS ANGRY ABOUT THE MANY INACCURACIES REPORTED ABOUT THE COURT BY THE LAS VEGAS REVIEW-JOURNAL.

PREFATORILY, I WANT to emphasize that the Las Vegas SUN has not contributed to the underlying reasons for my topic of discussion.

Perhaps the press has no greater obligation, and could perform no greater service, than to expose judicial corruption when it has been responsibly determined to exist. Our citizens have every right to demand honor and rectitude from their judges, and to harshly punish betrayals of the public trust by judicial officers.

On the other hand, equal condemnation should arise in the face of an irresponsible and purposeful attempt on the part of any newspaper to characterize as evil that which is good, and to publish as true that which is untrue.

Over the past two years, there has been irresponsible and inaccurate reporting and editorializing on what has become a high-profile judicial discipline case.

I began with two premises, both true. First, *the case* was processed by the Nevada Supreme Court with 100 percent honor and rectitude. Second, the press has a serious duty not to betray the public trust implicit in the First Amendment guarantee of freedom of the press.

I have pondered possible remedies for a betrayal of the public trust by the media. An unethical judge may be removed or otherwise disciplined. But what do you do with an unethical newspaper? There are published ethical codes applicable to the press, but virtually no enforcement mechanisms.

The current Code of Ethics of the Society of Professional Journalists embraces many noteworthy canons. Here are a combination of just a few of at least 17 canons that were demonstrably violated by one media outlet alone:

- "We believe in public enlightenment as the forerunner of justice, and in our constitutional role to seek the truth as part of the public's right to know the truth."

- Journalists are required to perform objectively, accurately and fairly with no excuse for inaccuracies or superficiality.

- Journalists violate a "high trust," by using their professional positions for "unworthy motives," and "news reports should be free of opinion or bias and represent all sides of an issue."

I would be pleased to demonstrate before an impartial board of inquiry that in reporting and editorializing on *the case*, a single newspaper has flagrantly violated each of the referenced canons of ethics. Despite its unilateral reliance on unethical sources of information, that publication should have recognized early on that the Nevada Supreme Court was dealing with a Discipline Commission that, however well-motivated, had been secretly administering discipline in violation of the Nevada Constitution.

Because our court had never had the opportunity to interpret the commission's rules since they became effective in 1988, *the case* presented the first opportunity for doing so.

The media source was actually attacking the court for acting in secrecy even as the court was moving to eliminate unlawful secrecy from judicial discipline proceedings. Fortunately, the Nevada Board of Bar Governors agreed that the court acted appropriately.

The court has done nothing more or less than it was ethically and legally obligated to do regarding *the case*. It did not prevent the disciplinary action; it merely interpreted the commission rules and ordered the panel to comply with its rules and the Nevada Constitution.

Though the court has handled *the case* with absolute fidelity to its public trust, the court and two of its justices were portrayed as attempting to cover up judicial wrongdoing, acting unethically in favor of judicial secrecy, and trying to protect a judicial crony at the expense of a viable Discipline Commission. The media source decried the fact that no other lawyers, judges or citizens raised their names in public protest of the "wrong, despicable, reprehensible and utterly obscene" actions of the court. Thereafter, proud of its public revelatory campaign, the press member attacked its own media colleagues for not having joined in the feeding frenzy.

And for all of its efforts to demean and trash the court, and despite its ostensible abhorrence for secrecy in government, the media source failed to recognize or view as important the fact that the Discipline Commission had unlawfully disciplined judges in secret for many years!

The damage wrought by a failure of media ethics has been enormous. Aside from the impairment of reputation suffered by certain judges, there has been significant loss of public confidence in the court system, **all for no just reason!** Victims include our citizens, the First Amendment, Nevada's third branch of government and good government in general.

I strongly hope that accountability may be forthcoming from within the journalism profession. The First Amendment guarantee of freedom of the press could not survive as we know it if, rather than disseminating truth, mass media are given free rein to become an anathema to an enlightened society.

EXHIBIT G

Justices' order misled Supreme Court
Las Vegas Review-Journal
Sunday, September 24, 1995

□TWO LAWYERS SAY REASONS GIVEN FOR DISMISSING ETHICS COMPLAINTS AGAINST A JUDGE CREATED A FALSE IMPRESSION.

By A.D. Hopkins
Review-Journal

Misleading statements and one falsehood were presented as facts to the Nevada Supreme Court when two justices sought in 1993 to dismiss ethics complaints against a Washoe County judge.

Two lawyers pointed out two misrepresentations in the order, which sources say Justice Charles Springer claimed to have authored. Those sources also say Justice Thomas Steffen urged fellow justices to sign the order, though Steffen denies that. The 1993 proposed order failed, but a court panel eventually dismissed the original charges against District Judge Jerry Carr Whitehead.

Donald Nomura, a Reno attorney who was a potential witness to one of the ethical offenses attributed to Whitehead, said Thursday he never gave an affidavit attributed to him in the proposed order. "It doesn't exist," he said.

In addition, Donald Campbell, a Las Vegas attorney who investigated the complaints against Whitehead for the Judicial Discipline Commission, said the order's author created the impression that key evidence didn't exist, even though the justices already had it in hand.

Nomura said, "It is a lie there was an affidavit. It's a lie that the behavior it supposedly cited ever occurred. And it is a lie that I ever suggested it occurred. In fact I said the opposite.

"If they are making reference to this affidavit, it is proof positive that there was contact between representatives of Whitehead and the court," said Nomura. The Nevada Code of Judicial Conduct says judges must not engage in substantive communications about a pending case with one side in a case without the knowledge of the other.

Nomura has not spoken publicly about the case until now, "I am not excited about being involved in this, but I am less excited about having my name used in that way," he said.

The proposed order, presented to the court on or before Oct. 4, 1993, contained a footnote accusing Campbell of inappropriate behavior when interviewing witnesses: "In doing this he has (we are told) engaged in 'completely inappropriate behavior' in the form of 'brow-beating witnesses' and insisting that they not communicate the contents of his interview to others (see, e.g., Affidavit of Donald Namura)," misspelling Nomura's name.

Nomura says there is no affidavit, and a Supreme Court employee was unable to find one this past week by examining the files of Whitehead's suit against the Judicial Discipline Commission.

There was in fact an affidavit before the court, from Whitehead's lawyers, saying they had sought an affidavit from Nomura but didn't get it.

"They wanted me to say the interviewing process was coercive and intimidating. But it was not, so I wouldn't agree to say so," Nomura said this week.

Campbell also pointed out misleading statements in the proposed order, including a statement that "the judge was neither advised of the names of his accusers nor provided with 'facts which, if true, would establish grounds for discipline.'"

But a document filed with the court on Aug. 17 and provided to Whitehead's lawyers contained that information, Campbell said.

"I was shocked once I read this," Campbell said. "The false impression is created, throughout this order, that no complaints were filed with the commission, and the commission just told me to go out and dig up dirt on Judge Whitehead. That is absolutely untrue. There were numerous complaints under oath, including several from Judge (Peter) Breen and several from Dorothy Nash Holmes, and Judge Brent Adams also sent in a written complaint to the commission. The only thing I ever investigated was those complaints. I didn't pick those out of thin air . . . .

"At the time this order was proposed, the court had those complaints in hand." The order implied the complainants were unknown to the court.

Other figures connected to the case were astonished and disappointed that the court tried to dismiss the Whitehead matter secretly, without allowing the discipline commission to hold hearings on whether Whitehead actually committed the offenses.

Breen, Whitehead's fellow judge in the Washoe County District Court and one of those who filed a complaint about Whitehead's conduct, said, "The fact that was proposed does not surprise me, but part of me didn't want it to be there. It is so disturbing in view of everything else the court has said. They said that no decision had been made on the merits of the case, that they didn't want to make one, and now it looks like they did."

Breen said he also could see no legitimate reason for an order that would have dismissed accusations against Whitehead yet demanded the commission turn over to the court every document or shred of evidence relating to Whitehead.

"I've been around the judiciary all my life and I haven't heard of such a thing. There is no parallel in the criminal process. The most we can do is seal the record of arrests and convictions and in some cases a court case. But they could have done that without demanding everything be turned over to the court. I see no legitimate reason for it."

Dorothy Nash Holmes, who filed complaints against Whitehead when she was Washoe County's district attorney, reacted similarly. "It's incredible to me that so many people were accused by the court of trying to prevent due process to the judge, and it turns out somebody on the court was trying to deny it to us. All we ever wanted was to get our charges heard, and it looks like they were determined we wouldn't."

Whitehead was accused of attempting to orchestrate a change of venue favorable to a defendant being prosecuted by Holmes. The specific ethical violation involved in that process and most of the other charges against Whitehead was improper communications with parties having business before the court.

Margo Piscevich, a former state bar president who was chastised in one Supreme Court opinion for commenting on the Whitehead case, said, "In hindsight I find it amusing that Justices Steffen and Springer believed the allegations against Whitehead had no merit, when he resigned in lieu of being prosecuted.

"Whitehead agreed to resign in return for an agreement from federal authorities, who conducted a separate investigation, that he would not be prosecuted. It was never revealed whether the federal investigation involved the same matters as the discipline commission's."

Steffen has not responded to the Review-Journal's requests for an interview about the 1993 document. The Las Vegas Sun reported Friday that Steffen acknowledged the document is authentic, but denied trying to get other justices

to sign it. "I am certain I would not have signed it. I doubt Justice Springer would have signed it whether he wrote it or not," Steffen was quoted as saying.

EXHIBIT H

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Case No. 24598

IN RE PETITION FOR A WRIT OF
PROHIBITION OR IN THE ALTERNATIVE
FOR A WRIT OF MANDAMUS

ORDER DISMISSING COMPLAINT

By petition filed with this court on July 22, 1993, the petitioner, the Honorable Jerry Carr Whitehead, district court judge of the Second Judicial District Court in and for the County of Washoe, sought relief from proceedings instigated against him in the Nevada Commission on Judicial Discipline (Commission). In addition to seeking a stay of further proceedings by the Commission, and the discovery of documents and activities involved in the Commission's decisions and investigative efforts, Petitioner sought justification of the Commission's jurisdiction in the premises.

Determining that Petitioner had set forth issues of arguable merit, this court, by order of a single justice entered July 22, 1993, issued the requested stay, ordered an answer and full discovery as requested in the petition. On July 30, 1993, a majority of the members of this court reaffirmed the order issued on July 22, 1993, except that the discovery granted in the earlier order was suspended until further order of the court.

Almost from the outset, the Commission, through a "Special Deputy Attorney General and Special Counsel," Donald J. Campbell, has taken the position of a partial advocate who has unhesitatingly referred to petitioner in disparaging terms as if he had been tried and found guilty. The "special counsel" has wandered far and wide in contacting individuals who may provide information that could be used against Petitioner in furtherance of what has obviously been a concerted, focused effort to assure the eventual embarrassment, discipline or removal of Petitioner.

Apparently oblivious to a change from the interim rules of procedure applicable in the case of Goldman v. Nevada Comm'n on Judicial Discipline, 108 Nev. 251, 830 P.2d 107 (1992) to the current Administrative and Procedural Rules for the Nevada Commission on Judicial Discipline (ARJD), Mr. Campbell declared that the Commission has "precisely" followed the Goldman procedure in the case against Petitioner. This, of course, is an admission that the Commission, through Mr. Campbell, has failed to recognize the substantive differences in procedure existing in Goldman and the instant matter.

Mr. Campbell has also sought to justify the methodology of the instant case by referring to certain statutes deemed by him to be supportive of his investigative efforts and the procedure adopted by the Commission. At this point it is sufficient for our purposes to note that the Nevada Constitution directed and empowered this court, not the legislature, to adopt rules of procedure for the governance of the Commission. See Art. 6, § 21 (5). Under constitutional mandate, this court's powers were extended to include providing the grounds for censuring of a justice or judge and rules relating to the conduct of investigations and hearings by the Commission. It is disingenuous for special counsel to attempt to justify his actions by citing unauthoritative sources for his authority. Stating the obvious, in the event of conflict between the ARJD

adopted pursuant to constitutional authority by this court, and any statute, the latter must give way to the former.

By way of further preliminary observation, the instant case represents perhaps the most egregious of several recent examples of the Commission exercising its powers without regard for the rules of procedure by which it is bound and which represent the only real assurance of due process to a judicial officer who is the subject of a complaint. Over the last several months, the Commission has, without jurisdiction, ordered or required at least four district court judges to submit to various forms of discipline, the propriety of which will not be discussed here. The point to be noted is that in each case, the form of discipline was bargained for or exacted without a finding of probable cause, the sine qua non of the Commission's jurisdiction to impose any form of discipline on a respondent judge. See Nev. Const. Art. 6, § 21 (7) (after preliminary investigation, Commission shall either dismiss the matter or order hearing before it); ARJD Rules 15, 16. We note by way of observation at this point, that ARJD Rule 31 addressing consent orders, is contained in Section V of the rules entitled "PROCEDURE AFTER FINDING OF PROBABLE CAUSE."

In analyzing the procedures adopted by the Commission in the instant case, it may be readily seen that the Commission has indulged in serious, substantive violations of the ARJD which have paved the way for the systematic and notorious persecution and disparagement of the Petitioner. Of course, whether Petitioner eventually attempts to ascertain and deal with the forces, causes and motives behind the extreme measures taken against him is not the concern of this court. The fact that they have been allowed to occur under the auspices of the Commission is, however, of grave concern to this court.

The following analysis of the activities characterizing the effort to engage and bring to bear the full weight of the

disciplinary powers of the Commission against the Petitioner describes the magnitude of our concerns for the maintaining of an independent judiciary. Each reference to a "Rule" refers to a rule of the ADMINISTRATIVE AND PROCEDURAL RULES FOR THE NEVADA COMMISSION ON JUDICIAL DISCIPLINE adopted by this court effective as of April 29, 1988.

1. Rule 12 requires a complaint against a judge to be in writing, under oath, and signed by the complainant except "in exceptional circumstances, in which the commission has substantial reason to believe that a complainant may in likelihood suffer untoward risk of embarrassment, harassment, or other detrimental consequences," in which case "the commission may on request, authorize its executive officer to sign and swear to a complaint on information and belief, in the complainant's stead."

RULE VIOLATION: First, the complaint, styled "COMPLAINT SEEKING DETERMINATION OF PROBABLE CAUSE" was not issued under exceptional circumstances at the request of any true complainant in order to prevent embarrassment, harassment or other detrimental consequences to the actual complainant. Moreover, there is not the slightest indication in this record that there was any possibility, let alone "likelihood" of embarrassment, harassment, or other detrimental consequences that would be suffered by any complainant. Nor does the record reflect any request for anonymity by any complaining party. Second, the complaint was prepared under the auspices of the Commission to incorporate the investigative efforts of its own appointed "prosecutor," as indeed revealed by the caption of the complaint seeking a determination of probable cause as opposed to a probable cause hearing. Third, rather than simply reflecting a sworn complaint from a complainant outside the Commission (a necessary prerequisite to Commission jurisdiction except under the limited circumstances set forth in Rule 10), Rule 13 ("A complaint submitted to the commis-

sion . . ."), Rule 14 ("The commission will consider all complaints brought before it . . . "), the complaint is the work product of the Commission's own agent who systematically canvassed numerous persons in order to develop what he considered an adequate factual basis for preparing and signing an "in-house" complaint. Moreover, the so-called complaint evidences the most serious impropriety of having an arm of the Commission, obligated to absolute impartiality and fairness, acting as investigator, prosecutor, and judge prior to a finding of probable cause, as reflected by the strongly emotive, disparaging and conclusory language of the complaint and the Commission filings in this court. This procedure is not authorized by any rule, and is contrary to both the letter and spirit of the rules.

We might be willing to overlook a failure to follow Rule 12, except for the prejudicial effect inherent in Ms. King's violation of the rule. The record contains no indication that the Commission did, as required by the rule, "permit" Ms. King to proceed to file a complaint in the "complainant's stead," even if there had been, in fact, grounds for permitting such a surrogate filing. The prejudice in this case stems in part from the fact that the judge was neither advised of the names of his accusers nor provided with "facts which, is true, would establish grounds for discipline." ARJD Rule 12.

The "Complaint Seeking Determination of Probable Cause" is defective in that there has been no request that Eve King file the complaint, rather than the "real" complainant, whoever that might be, there has been no showing of "embarrassment" or other cause for permitting Eve King, rather than the real complainant, to complain "upon oath in writing," and, most critically, the record contains no indication that the Commission did in fact "permit the executive officer to complain in the complainant's stead." The proceedings must be dismissed on these grounds alone; however, there are other reasons warranting a dismissal.

Understandably (because Ms. King claims no actual knowledge of judicial misconduct on the part of Judge Whitehead), the Complaint Seeking Determination of Probable Cause is almost completely deficient of "facts which, if true, would establish grounds for discipline." ARJD Rule 12. Although the Nevada Constitution requires a showing of "willful misconduct, willful or persistent failure to perform the duties of his office or official intemperance," there is no specification of which category Ms. King has intended to pursue against Judge Whitehead. Ms. King bases all "charges" upon Canon 2A of the Code of Judicial Conduct which merely enjoins our judges to "respect and comply with the law" and to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." We find no facts in the multiple "Counts" levied by Ms. King against the judge that show that Judge Whitehead did not respect or comply with the law or that he failed to promote public confidence in the integrity and impartiality of the judiciary. Further, even if the judge's "respect" for the law or his supposed failure to promote public confidence in the integrity and impartiality of the judiciary were put at issue, they would hardly support disciplinary action based on any of the stated constitutional grounds, willful misconduct, willful or persistent failure to perform, or habitual intemperance. The constitutional predicates for judicial discipline are never mentioned in the Complaint now before the court. ARJD Rule 11 restricts the charges in this matter to "acts and omissions . . . which contravene express provisions of the Nevada Code of Judicial Conduct." Ms. King's necessarily indirect and hearsay complaint relates no specific acts on the part of Judge Whitehead which contravene any express provisions of the Code.

If Ms. King had been authoritatively permitted to file the subject complaint, it would have been necessary for her to relate specific acts that had been charged by an identified (if anonymous) complainant and to specify the "express provisions" of the Code that she claimed were being "contra-

vened" by Judge Whitehead. Obviously, Ms. King knows nothing about Judge Whitehead's conduct and is herself a victim of the phantom investigation resulting in this complaint. What she has filed, even had she complied with ARJD Rule 12, does not come remotely close to stating a cognizable judicial discipline complaint. Ms. King's Complaint must be dismissed on the ground that the complaint is jurisdictionally insufficient and fails to state any grounds upon which disciplinary action can proceed before the Commission. There are still other reasons why the complaint must be dismissed.

2. Article 6, § 21 (7) of the Nevada Constitution provides, in pertinent part, that "[t]he Commission shall, after preliminary investigation, dismiss the matter or order a hearing to be held before it." (Emphasis added.) Mr. Campbell has fixed on the highlighted terms as license for a wholesale investigation untethered to an incoming sworn complaint as contemplated by Rule 12. Moreover, he has repeatedly stressed that he has strongly admonished all of his investigative contacts of the confidential nature of his inquiries. It is clear that his admonitions have been of little comfort to the beleaguered Petitioner whose alleged misbehavior has been discussed far and wide by Mr. Campbell albeit within what he has described as confidential settings. A judge's reputation can just as easily be besmirched by Mr. Campbell's "confidential" methodology as it could be if printed in a newspaper circulated only to the same interviewees. Nevertheless, as we shall see, it is not the extent to which petitioner's reputation has been damaged that is of immediate issue here. Rather, the issue involves the propriety of Mr. Campbell's investigative activities as authorized by the Commission.

RULE VIOLATION: The Rules lend context and meaning to "preliminary investigation." Rule 14 provides, in part, that "[t]he commission will consider all complaints brought before it with a view to determining whether or not there exists sufficient cause to proceed to a probable cause hearing." The rule does not expressly or impliedly authorize

the Commission to use an incoming complaint as a basis from which to launch a full scale investigation into any and all aspects of a judge's judicial performance. The incoming complaint sets forth the length and breadth of any "preliminary investigation" for determining whether there is a basis for scheduling a probable cause hearing. Understandably, the Rules provide for the appointment by the Commission of a prosecuting attorney only after there has been a determination of probable cause. See Rule 16. Here, special counsel Campbell is in every reasonable sense a "prosecuting attorney" who has extensively investigated prospects for complaint far beyond those contained in letters of "complaint" sent to the Commission. Moreover, Campbell has, despite the denomination of the complaint, prepared and signed a charging document strongly akin to the formal statement of charges required to be prepared by the prosecuting attorney after a finding of probable cause. Rule 16.

It is clear to this court that Rule 14 contemplates a prescreening of complaints for purposes of determining whether Rule 11 grounds have been alleged and if so, whether there is a factual basis for the complaint. A preliminary investigation regarding any factual support for the complaint would entail a simplified and inexpensive procedure. A telephone communication with the complainant would ordinarily reveal the extent of the evidence supporting the written charges. For example, the complainant may indicate that Attorney Jones advised him that the alleged misconduct occurred in his presence. A call to Attorney Jones would then afford confirmation or denial of the alleged misconduct. If Attorney Jones' explanation appears forthright, and if true, would constitute a Rule 11 grounds for discipline, the Commission would then have a basis for scheduling a probable cause hearing and promptly providing written notice to the respondent judge of the complaint and the necessity of filing a written response thereto within 30 days after service. Rule 14.

We are informed by a member of the Commission that large numbers of "complaints" are submitted to the Commission against judicial officers in Nevada. This is hardly surprising in that judges by the very nature of their office are constantly making decisions that are a source of agitation and disappointment to countless numbers of litigants and attorneys. We are also informed, not surprisingly, that the vast majority of complaints are without merit. We have also been advised by a member of the Commission, as grounds for having imposed discipline on certain judges without benefit of the jurisdictional prerequisite of a finding of probable cause, that it is too expensive and time consuming to conduct hearings, and that if the Commission were obligated to do so he and other members of the Commission would be forced to resign. Aside from the obvious invalidity of discipline imposed without jurisdiction in the name of expediency, we have grave concerns over the selective nature of the instant "prosecution," with its enormous commitment of time, resources, and expense, when compared with other matters of a patently more serious nature that have come before the Commission over a period of the last several months that have demonstrably resulted in far less concern by the Commission than the instant matter.

In any event, it is clear to this court that the "preliminary investigation" referred to in the Nevada Constitution relates to a specific complaint and charge by a specific complainant, and that it was obviously intended, by its own terms, to apply to the minimum effort necessary to determine whether to dismiss the complaint on its face or proceed to a probable cause hearing. In our recent opinion in In re Stuhff, 108 Nev. 629, 837 P.2d 853 (1992) we severely disciplined an attorney who served a district court judge with a copy of a complaint to the Nevada Commission on Judicial Discipline. There we held as follows:

> Rules 12 and 14 . . . clearly provide that a grievance against a judge is initiated by filing an initial

> complaint. Nothing in either rule requires notice; in fact, they implicitly forbid it. Additionally, Rule 5 of this subsection provides that "[a]11 proceedings must be confidential until there has been a determination of probable cause and filing of formal statements of charges."

Id., 108 Nev. at ____, 837 P.2d at 857.

In Stuhff, the attorney alleged in his complaint to the Commission that the respondent judge had committed misconduct in presiding over a specific criminal trial. Moreover, in his testimony before the Southern Nevada Disciplinary Board, attorney Stuhff testified that he "didn't think he [the respondent judge] should have tried [his criminal client] or anyone else and from what I've seen of [the respondent judge] I did not think that he should act as a judge in a criminal case." id., 108 Nev. at _____, 837 P.2d at 856. If the Commission had elected to pursue the respondent judge in Stuhff as it has in the instant matter, a special prosecutor would have been appointed who, "in a confidential setting," would have interviewed numerous judges and attorneys in an effort to prove that the respondent judge was unfit to preside over criminal trials.

The investigation that has occurred in the instant matter over a period of months and in a method calculated to locate additional sources and areas of complaint, is a far cry from a preliminary investigation as contemplated by the Nevada Constitution and as provided under the Rules. It represents an all-out effort to selectively prosecute the Petitioner for reasons known only to the Commission and those such as Mr. Campbell who have been so heavily involved in the proceedings. Confidentiality has been a hollow word to Petitioner whose apparent difficulties with the Commission have been voiced to any number of persons in the name of "preliminary investigation." Notwithstanding the unauthorized procedures heretofore noted, there are more compelling reasons why the

so called complaint against the Petitioner must be dismissed and stricken.

3. Rule 11 provides the grounds that will support an exercise of jurisdiction by the Commission in imposing discipline on a judge. In that regard, it is both necessary and revealing to analyze the content of Ms. King's complaint. It appears that Ms. King's charges are the product of the "investigation" conducted by special prosecutor Campbell.[1] Mr. Campbell has, over a prolonged period, sought witnesses who would substantiate Ms. King's charges that Judge Whitehead does not pay proper respect to the law or fails to promote public confidence in the judiciary.

RULE VIOLATION: Both Mr. Campbell's investigation and Ms. King's complaint completely fail to present a case

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[1] Mr. Campbell on some occasions styles himself as "special counsel to the Commission." The Rules, of course, contain no provision which permits the Commission to retain "special counsel" at this stage of the proceedings. The attorney general is acting as counsel for the Commission, and the record shows that Mr. Campbell's function has been to try to construct a "case" against Judge Whitehead. In doing this he has (we are told) engaged in "completely inappropriate behavior" in the form of "browbeating witnesses" and insisting that they not communicate the contents of his interviews to others (see, e.g., Affidavit of Donald Namura). Judge Gamble tells us that when Mr. Campbell interviewed him, Campbell was biased against Judge Whitehead, "disrespectful to Judge Whitehead as a person and as a judge." Judge Gamble tells us that "Mr. Campbell took every opportunity to castigate Judge Whitehead and to characterize Judge Whitehead's actions as though they were something vile and malignant." It was clear to Judge Gamble that "Mr. Campbell was attempting to influence (his) opinion about Judge Whitehead's actions rather than simply requesting information about my experiences with Judge Whitehead." This same Mr. Campbell now asks this court to keep his interviews and investigations secret based on some kind of privilege. We can conceive of no honest motives for investigator Campbell's refusal to disclose the names of the phantom witnesses upon whose interviews Ms. King's complaint are apparently based. Until such time as a justiciable complaint is filed and probable cause found, it is clear that Mr. Campbell may no longer continue to act as "special counsel" to the Commission.

upon which the Commission can act. Let us examine the King/Campbell charges appearing in the complaint.

Count One, without any stated basis in fact, charges that Petitioner "intentionally embarked upon a scheme" to "deter and punish" some unnamed "counsel" from exercising peremptory challenges. This charge must be ignored. There is no prohibition in the Code against "scheming" or other similar thought processes. Mr. Campbell has refused to provide Petitioner with the names of his accusers. Apparently, Campbell would not even tell Ms. King who Petitioner was "scheming" against or she could have insisted that Campbell include their names in the complaint drafted by Campbell on her behalf. This count is utterly without merit and states no charge that would support an order of discipline.

Count Two. This count charges that, after Petitioner was peremptorily challenged (and after, presumably, he was no longer the judge in the case), he telephoned one of the attorneys in the case and asked him to suggest a new judge.

This is a good point at which to address the administrative nature of Ms. King's complaint. As seen by the footnote below, the administrative methodology at issue here in the peremptory challenge process was commonplace during the period covered by Campbell's investigation and Ms. King's complaint. We have adopted an administrative rule change to address and make uniform the procedures for reassigning cases after a judge has been peremptorily challenged. Petitioner's practice as described in the complaint, if true, reflected an administrative policy employed by other judges prior to the recent amendment of our rule.[2] Petitioner cannot possibly

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[2] In dealing with this administrative problem, this court first recited the basis for amending SCR 48.1 as follows:

> On February 22, 1993, the Board of Governors of the State Bar of Nevada filed a petition requesting that at Rule 48.1 of the Supreme Court Rules be amended so as to expressly prohibit a district court judge against whom a peremptory challenge has been (continued...)

have been guilty of a violation of the Code by reason of the charged conduct, even if it were true.

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[2](...continued)

made from contacting the party making such a challenge, or the party's attorney, and to prohibit the challenged district court judge from communicating with the district court clerk with regard to reassignment of a case following a peremptory challenge.

Thereafter, this court solicited input and received numerous responses from members of the judiciary and the state bar concerning the proposed amendment to SCR 48.1. A review of those responses reveals that a problem or potential problem exists throughout the state with regard to ex parte communications initiated by the challenged judge, and the challenged judge's involvement in the reassignment of the case, following the filing of a peremptory challenge. Accordingly, we conclude that the amendment of SCR 48.1 is warranted.

(Emphasis added.)

In view of the history recited above, this court amended SCR 48.1 in pertinent part as follows:

2. . . . Within 2 days of the notice of peremptory challenge having been filed, the clerk of the court shall:

(a) In a judicial district in which there are more than two departments, randomly reassign the case to another judge within the district;

. . . .

6. [The judge against whom a peremptory challenge is filed shall transfer the case to another department of the court, if there is more than one department of the court in the district . . . .] (bracketed provision, was deleted). The judge against whom a preemptory challenge is filed shall not contact any party or the attorney representing any party, nor shall the judge direct any communication to the clerk of the district court with respect to reassignment of the case in which the peremptory challenge was filed.

The above amendment was dated the 17th day of June, 1993, and became effective 60 days after its entry.

Count Three. This is another charge relating to administrative practices engaged in before we adopted an amendment to Rule 48.1 to cover the area under discussion. In this charge, Petitioner is again said to have engaged in practices comparable to those charged in Count Two, after he had been challenged and was no longer the judge in the case. There is no substance to this charge.

Counts Four and Five. These counts charge that Petitioner expressed his opinions concerning peremptory challenge practices while addressing attendees at "Bridge the Gap seminars." [sic] This charge criticizes the Petitioner for leaving "open the possibility that the exercise of a peremptory challenge against him could result in an unfavorable assignment to a new department." These are hardly charges which can support disciplining Petitioner on the grounds of "willful misconduct." It seems unworthy of note that expressing one's opposition to a supreme court rule is not misconduct. With the greatest restraint, we merely note that these counts give new meaning to the term "meritless."[3]

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[3] At this juncture, we should remind the reader that ARJD provides that the Commission "has no jurisdiction" in cases in which "differences of opinions of judges as to matters of law or policy" are concerned. Petitioner had an opinion relating to the opinion of other judges, and as it appears from our recent amendment to Rule 48.1, contrary to the opinion of this court. Nevertheless, Petitioner was free to express his opinion then as he is free to express it now. Since the effective date of the referenced amendment, Petitioner and all other judges of his persuasion or view are bound to follow the procedure provided by the amendment. This matter has been addressed administratively by this court, and both the amendment and the recital preceding its adoption should make clear that the procedures attributed to Petitioner, if true, do not constitute a basis for Commission jurisdiction regarding Petitioner or any other of the judges who engaged in the practice prior to the effective date of the new amendment.

Counts Six and seven. Two more peremptory challenge charges comparable to those discussed above, that are equally meritless.

Counts Eight Nine and Eleven relate to supposed "ex parte" contacts with a friend of the Petitioner, one Ernest Martinelli, after Petitioner had been removed from a case by peremptory challenge.[4] The specific charge is that Petitioner's conduct was "in keeping with neither the spirit nor the letter of SCR 48.1, and, indeed, was calculated to chill the legitimate rights of the parties." These charges, in the main, object to Petitioner's expression of opinion as to how he believes the practice of making peremptory challenges ought to be carried out. These counts also lack merit or a basis for Commission jurisdiction.

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[4] Campbell contends that Petitioner's conclusion that he no longer had jurisdiction in any of the referenced cases after he was peremptorily challenged is without merit because Petitioner still had jurisdiction to determine whether the challenge was timely. See Nevada Pay TV v. Eighth Judicial Dist. Court, 102 Nev. 203, 719 P.2d 797 (1986). Campbell's contention is unavailing in the context of the complaint filed against Judge Whitehead. It is in fact clear that in the event the challenges were timely, Petitioner would have been automatically divested of any jurisdiction other than the administrative duty to reassign the case to another department of the court. To conclude that a cognizable charge has been specified in the complaint on the assumption that one or more of the alleged ex parte contacts may have occurred with regard to a case where the challenge was untimely is patently without merit.

A valid complaint is not based upon assumption. To illustrate the point, Campbell's position is akin to arguing that the state could file a valid criminal information charging a defendant with murder on grounds that he may not be able to prove that the killing occurred in self defense. The Commission, with all of its investigation in this case is not in a position to assume that improper ex parte contacts were made concerning a pending case because the peremptory challenge may have been untimely. Moreover, the argument makes little sense in the face of Petitioner's alleged reluctance to reassign cases from his court based upon peremptory challenges.

Count Twelve charges that Petitioner criticized an attorney. There is no conceivable basis for a willful misconduct charge contained in this count.

Because none of the twelve counts contain any facts upon which a charge of willful misconduct could be based, Ms. King's complaint must be dismissed.

In addition to the rule violations addressed in part above, this court has other concerns related to this proceeding. We have ordered the Commission to "explain the authority by which it has summoned non-complaining witnesses before a finding of probable cause has been made and thereby, of necessity, violating the confidentiality of the proceedings before the Commission." No satisfactory answer to this question has been given by the Commission, and we are aware of none.

This case is extremely perplexing. We understand that the Commission has a difficult and important mission to fulfill. we also understand the necessity of maintaining the vitality of an independent judiciary. In the instant matter, it is clear to this court that a concerted, dedicated and highly inordinate effort has been marshalled in order to assure the prosecution of the Petitioner. The grounds resulting from the lengthy investigation may indeed attest to the integrity of the Petitioner given the extent of the resources and time committed to develop charges upon which to proceed against him. When compared with other matters considered by the Commission over the past months, the charges against Petitioner are paled by the comparison. This is worrisome as it tends to suggest that forces are at work that are inconsistent with the bona fides to be expected and demanded from the Commission.

The Commission has hired or otherwise agreed to the appointment of a special investigator, more aptly described as a special prosecutor, without any apparent authority for doing

so, to go out and develop a case against Petitioner. In attempting to make this case, the investigator has reportedly threatened witnesses and, in the guise of "special counsel," has done everything in his power to create a bias in the Commission against Petitioner. Most alarming is the investigator's refusal to disclose to Petitioner the nature and content of his investigation. Apparently at Campbell's instance, the Commission refuses to disclose the names of Campbell's witnesses or the contents of their statements. If we were to allow this disciplinary proceeding to continue, something we could not possibly justify, Petitioner would be placed in a position where he would have precious little basis for responding to Ms. King's charges that he has not had respect for the law and has failed to "promote public confidence" in the judiciary. The Commission and its special prosecutor have refused to tell Petitioner what witnesses were used to support the surrogate complaint by Ms. King or to tell him the factual basis for the disciplinary action against him. The Commission's refusal to answer our order addressed to it and its refusal to disclose <u>everything</u> that was considered in deciding to hold a probable cause hearing," represents an unauthorized election which not only prevents Petitioner from having his rightful opportunity to present a defense, but is also an affront to this court. On this ground, also, we order the complaint dismissed.

This case presents a serious miscarriage of justice. Overlooking leniency accorded in situations where serious discipline may have been warranted if jurisdictional requisites had been followed, the Commission has invoked what appear to be almost unlimited resources to pursue disciplinary measures against Petitioner because of his policy and views on the subject of how peremptory challenges ought to be handled administratively. The Commission, completely out of control, has hired a special prosecutor and provided him with what appears to be a mandate to take whatever time and effort is necessary to develop some kind of colorable case against Petitioner. Indeed, counts two and three of the complaint

represent allegations of misconduct dating back to 1986 and 1988, respectively.

This case would be all the more frightening if it had not been so ineptly handled. Apparently, neither the Commission nor prosecutor/investigator Campbell took the time or trouble to read the Rules. Campbell's attempt to justify the procedures utilized against Petitioner by citing precise compliance with the procedures in Goldman, appears at best to be an unwitting admission of marching to obsolete orders, and at worst a revelation of willingness to resort to any and all measures to achieve a predetermined end. In any event, we could never countenance the ad hoc, draconian procedures adopted here--hiring an investigator to build a secret case to present to Ms. King so that she could file an unauthorized complaint without named complainants. Add to this the Commission's refusal to disclose the names of the true accusers or the contents of their accusations and we reach a level of official abuse that is of intolerable proportions.

We have carefully reviewed all other aspects Of the Complaint and the arguments of Commission's special counsel and conclude that they need not be discussed as they are also without merit. We have also determined that oral argument concerning the petition and Petitioner's entitlement to relief would be of no assistance to the court.

Given the foregoing IT IS ORDERED:

1. Ms. Eve King's "Complaint Seeking Determination of Probable Cause" is dismissed.

2. The Commission on Judicial Discipline and Donald Campbell are hereby ordered:

   a. To deliver to this court all statements (including "work products"), notes, and any written record of any kind relating

to all disciplinary proceedings against Judge Whitehead.

b. To disclose forthwith to this court all expenses of any kind, whether paid or not, and whether presently owing or not, relating in any way to the investigation and prosecution of Judge Whitehead.[5]

ROSE, C.J.

STEFFEN, J.

SPRINGER, J.

SHEARING, J.

GUY, D.J.

[5] The Honorable Cliff Young, Justice, was disqualified to serve on this case by reason of his current assignment as a member of the Commission.

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 21st day of December, 1995, I served a copy of the foregoing PETITION FOR A WRIT PROHIBITION OR IN THE ALTERNATIVE FOR A WRIT OF MANDAMUS by placing said document in the U.S. Mail, postage prepaid, addressed to:

Chief Justice Thomas L. Steffen
Nevada Supreme Court
Capitol Complex
Carson City, NV 89710

Justice Charles E. Springer
Nevada Supreme Court
Capitol Complex
Carson City, NV 89710

Senior Justice David Zenoff
c/o Administrative Office of the Courts
Capitol Complex
Carson City, NV 89710

Herbert F. Ahlswede
Special Master
c/o Administrative Office of the Courts
Capitol Complex
Carson City, NV 89710

/s/ REBA COOMBS

APPENDIX B

[Filed Dec. 22, 1995]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Case No. 27847

NEVADA ATTORNEY GENERAL,
FRANKIE SUE DEL PAPA,
Petitioner,

vs.

THE HONORABLE THOMAS L. STEFFEN, Chief Justice of the Nevada Supreme Court, THE HONORABLE CHARLES E. SPRINGER, Justice of the Nevada Supreme Court, THE HONORABLE DAVID ZENOFF, Senior Justice of the Nevada Supreme Court, in their official capacities and HERBERT J. AHLSWEDE, in his official capacity as Special Investigator,

Respondents.

RESPONSE OF JUSTICE CHARLES E. SPRINGER
TO ATTORNEY GENERAL'S PETITION
TO PROHIBIT INVESTIGATION OF
ATTORNEY GENERAL'S OFFICE

AND

MOTION TO DISQUALIFY JUSTICES
YOUNG, ROSE AND SHEARING

As one of the respondents above named, Justice Charles E. Springer responds to Attorney General Frankie Sue Del Papa's[1] Petition in the following manner.

I.

GENERAL STATEMENT OF OPPOSITION TO PETITION

The Attorney General is seeking an ex parte "stay" of the investigation into her office. Because the investigation to-date has gone far beyond contempt of court and the intentional, wrongful disclosure of confidential materials relating to judicial discipline proceedings and because the Attorney General is seeking an immediate "stay" of the investigation[2] into her office and into possible official misconduct by others, I conclude that it is urgently necessary for me to respond immediately to the petition and to file an opposition to any request for a "stay" of the investigation. I do this principally [sic] because I fear that three justices of this court might, without a hearing or other opportunity to oppose the petition, come to the false conclusion that they had the power to order me and other members of the Whitehead panel to

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[1] Frankie Sue Del Papa, as Attorney General, is the official legal counsel for me and for the other named respondents. That she would sue her "clients" in this way presents an arguable conflict of interest and certainly leaves respondents without legal representation.

[2] It has been argued by the Attorney General that the court has no authority to appoint a special master to investigate matters relating to contempt of court. I refer those who challenge the legality of the investigation to NRS 1.210:

> Every court shall have power: . . . (2) To enforce order in the proceedings before it, or before a person or persons empowered to conduct a judicial investigation under its authority.

(emphasis added).

discontinue the investigation now in progress. Briefly put, the grounds for my opposition are:

1. Justices Young, Rose and Shearing are disqualified to act in this case because:

   a) Justices Young and Rose are disqualified from the underlying case and are not qualified to issue orders which overrule the law of the case and the duly-entered decisions and judgments of the Whitehead court.

   b) Justice Rose has identified Justice Shearing as one of the objects of the ongoing investigation; and it would, accordingly, give an appearance of impropriety for her to try to stop the investigation.

   c) Justices Young, Rose and Shearing are potential targets of the investigation.

2. The Attorney General's petition is substantively invalid because:

   a) The invalid administrative order mentioned in her petition (that is, the order purporting to reverse an order of the Whitehead panel and terminate the investigation) is void and has been declared void by a properly-entered opinion and decision of this court dated December 15, 1995.

   b) The Attorney General has alleged no specific, remediable injury to herself that would give her standing to file such

a petition. That the investigation is seeking information regarding official misconduct relating to contempt of court is not an "injury" to the Attorney General that is subject to redress. No public funds have been employed by the Special Master to date; but even had public funds been used to perform a constitutionally-mandated duty, this would not be an "injury" to the Attorney General.

3. The Attorney General's petition is procedurally invalid on its face because:

a) The Attorney General has chosen a remedy that is not available to her. Prohibition[3] runs to "inferior tribunals" that are acting in excess of their powers. There is no inferior tribunal identified in her petition. Mandamus[4] is available only to compel performance of a duty required by law; this is not the relief sought in the petition. It is legally impossible for either writ to be granted by this court.

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[3] "The writ [of prohibition] may be issued only by the supreme court to an inferior tribunal" or others who are "exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal . . . ." NRS 34.330; NRS 34.320. Prohibition is not the proper remedy for thwarting investigation by the court of the Attorney General's office. The court's attempt to uncover those who are guilty of contempt of court is not a "judicial function" as such.

[4] The purpose of a writ of mandamus is to "compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station . . . ." NRS 34.160. Obviously, mandamus is not a proper remedy here.

b) The Attorney General's petition fails to name or serve the real party at interest, namely Judge Whitehead, who was successful in having his motion for an investigation granted by the supreme court. Due process requires that notice and opportunity to be heard be granted to Judge Whitehead.

c) The Attorney General's petition fails to name the Nevada Commission on Judicial Discipline, also a real party at interest in this matter. Due process requires that notice and opportunity to be heard be granted to the Commission on Judicial Discipline.

d) The Attorney General has no standing to file the petition in question because she was not a party to the underlying action in which the investigation was ordered, and she is not counsel to either party in that action.

4. All of the issues raised by the Attorney General's petition have been decided in a true case and controversy in which a final and binding decision on has been reached. The Attorney General, having been counsel to one of the parties in the underlying litigation, is certainly bound by those decisions, namely:

a) Allegations in the petition's paragraph 5 relating to this court's appointment of a special master have been fully briefed, argued and decided.

b) Allegations in paragraph 5 relating to the supposed baseless inquisition have been duly briefed, argued and decided.

c) Allegations relating to any claimed interference with First Amendment rights have been duly litigated and decided.

5. There is no difference between a "duly-elected" court and a court constitutionally composed in a given case after disqualification of one or more of the "elected" justices and substitutions by qualified district judges or senior judges. All justices, whether elected or appointed are coequal. In that connection:

a) The "lawfully constituted authority" of the court at all times belongs to the justices who are duly authorized to preside over and decide any given case, and any attempt to exercise such authority by a disqualified justice is unlawful and unconstitutional.

b) No person, whether a public official or otherwise, has a right to thwart a lawful investigation into possible contempt of court or other official misconduct relating to judicial functions.

c) There is no allegation that the Master's investigation is in any way being conducted in an unlawful manner.

6. In addition to the clear procedural and substantive defects mentioned above, it is clear that Justices Young, Rose and Shearing do not have

the capacity to act on this petition. Justices Steffen and Springer are parties to the case. Consequently, there will be no justices qualified to sit in judgment of the Del Papa petition and there could be no relief granted by the Supreme Court under these circumstances even if the petition were legally supportable.

II.

JUSTICE SPRINGER'S SPECIFIC RESPONSE TO PETITION

In response to paragraph 1: Respondents Steffen, Springer and Zenoff did, together with a fourth jurist, after briefing and oral argument by both sides, grant a motion which resulted in the appointment of Mr. Ahlswede as a Special Master assigned to investigate possible contempt of court in the form of intentional breaches of confidentiality in the Whitehead matter. Initial investigation discloses that the misconduct being uncovered by the Special Master goes well beyond mere "leaks" to the newspapers and involves possibly serious official misconduct.

In response to paragraph 2: The "court" did not file any petition. Justices Young, Rose and Shearing filed a petition, without giving notice to any of the interested parties. The mentioned petition had, as its stated purpose, the overruling of decisions in the Whitehead case by means of an "administrative" order. It is impossible, of course, to overrule an established judicial decision in this manner.

In response to paragraph 3: On September 15, 1995, three judges signed a null and invalid order purporting to overrule decisions made in the Whitehead case. There has been no expenditure of public funds in the Master's investigation. The void "administrative" order was declared null and void

by this court in an opinion filed December 15, 1995. This is now the law of the case.

In response to paragraph 4: The Attorney General's office is the subject of a lawful Master's investigation. This fact does not constitute an "injury" which is legally redressable by this petition or by any other known legal action.

In response to paragraph 5: As stated, actions by Justices Young, Rose and Shearing purporting to reverse decisions in the Whitehead case are void and have been declared void by a lawful decision of this court. The investigation by Mr. Ahlswede to date is anything but a "fabricated and baseless inquisition into the legitimate functions of [the Attorney General's] office." The Special Master has in his possession sworn statements and documents which, at the very least, warrant further inquiry into the Attorney General's office and into the conduct of other public officials. The public has the right to have this investigation continue.

In response to paragraph 6: The Attorney General has no standing either in her official capacity or her individual capacity to sue members of this court in an attempt to thwart an investigation of her office. The Attorney General claims to have "status as the duly elected and acting legal representative of the citizens of the State" to sue members of the court in order to prevent any further investigation of her office. Such a "status," it is respectfully submitted, is not supported by the law of this State or of any state.

In response to paragraph 7: The Attorney General's charge that the unlawful breaches of confidentiality "pale[] in comparison to the self-destructive maneuvers implicated by the recent activities of the Respondents" is impertinent and unintelligible; so no response is given to these allegations.

In response to paragraph 8: The statements in paragraph 8 are argumentative and rhetorical and obviously

designed for some purpose other than the stated purpose of the petition; therefore, no answer is given.

In response to paragraph 9: This respondent denies that the Master's investigation will in any way subject the Attorney General or any other public official to an "unlawful interference with the orderly operation of her office, a denial of due process and violations of federal constitutional rights." The Master's investigation is purely and simply an attempt to get at the truth. This attempt is certainly being opposed in an extremely vigorous manner by the Attorney General.

III.

MOTION FOR DISQUALIFICATION OF JUSTICES[5]

Justice Charles E. Springer moves that Justices Young, Rose and Shearing be disqualified from acting in any way in this matter for the following reasons: (1) Justices Young and Rose are disqualified from acting in any matter relating to decisions made in the Whitehead case. (2) Justice Rose is the subject of the Master's investigation, and he has publicly identified Justice Shearing as the subject of the investigation. It would at least give an appearance of impropriety for either of these justices to act in any way in this matter. (3) Justice Rose has exhibited actual bias as reflected in his comments at the administrative hearings relating to this matter.

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[5] I note that NRAP 35 contains the requirement that certain formalities be fulfilled by attorneys who file motions to disqualify justices (e.g., that attorneys file a "certificate of the attorney" that the "attorney has read the motion.") I file this motion in my capacity as a supreme court justice; and until counsel has been made available to me in my official capacity, the formal requirements of NRAP 35 will be suspended in accordance with NRAP 2. It is my hope that Justices Young, Rose and Shearing will disqualify themselves, thereby making my pursuit of this motion unnecessary.

The legal grounds for this motion are:

1. Justices Young, Rose and Shearing are by order of this court disqualified to act in any matter relating to the Whitehead case or the Master's investigation into contempt of this court.

2. Justices Young, Rose and Shearing have an implied bias, under NRS 1.225(2) because they have an interest in the proceedings, namely, an interest in thwarting an investigation which appears to relate in some measure to the mentioned justices.

3. The impartiality of Justices Young, Rose and Shearing is reasonably subject to question under Canon 3(C)(1) because of their own apparent involvement in the investigation.

4. Justices Young, Rose and Shearing have a direct interest in the outcome of the petition, in violation of the Due Process Clause of the United States Constitution, as evidenced by their attempts to thwart an investigation which may involve their own misconduct.

5. Justice Rose has exhibited actual bias under NRS 1.225(1) and Canon 3(c)(1)(a), as evidenced by his remarks at the "administrative" meeting of December 15, 1995, and by the statements to the press. These remarks are now being gathered and will be supplied at a later date as a supplemental to this motion.

/s/ JUSTICE CHARLES E. SPRINGER

Date: December 22, 1995

APPENDIX C

[Filed Dec. 26, 1995]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Case No. 27847

NEVADA ATTORNEY GENERAL,
FRANKIE SUE DEL PAPA,
Petitioner,

vs.

THE HONORABLE THOMAS L. STEFFEN, Chief Justice of the Nevada Supreme Court, THE HONORABLE CHARLES E. SPRINGER, Justice of the Nevada Supreme Court, THE HONORABLE DAVID ZENOFF, Senior Justice of the Nevada Supreme Court, in their official capacities and HERBERT J. AHLSWEDE, in his official capacity as Special Investigator,

Respondents.

ORDER

An original petition for a writ of prohibition or mandamus was filed by the petitioner. Although this court did not request an answer to this petition, respondent Charles E. Springer, Justice of the Nevada Supreme Court, filed a response to this petition on December 22, 1995. Justice Springer also filed a motion to disqualify Cliff Young, Robert E. Rose and Miriam Shearing, Justices of the Nevada Supreme Court, from participating in the decision of this petition.

Pursuant to NRAP 21(b), this court may summarily deny an original petition for an extraordinary writ, or this court "may enter an order fixing time within which an answer directed solely to the issues of arguable cause against issuance of an alternative or peremptory writ may be filed by the respondents . . . ." The rule further provides that "[t]he court shall by order advise the parties of the dates on which briefs are to be filed, if briefs are required . . . ." The intent of the rule is clear, and the practice of this court has been consistent: This court does not allow answers to petitions for extraordinary writs to be filed without prior direction from this court, and at this court's discretion. Accordingly, we direct the clerk of this court to strike as unauthorized that portion of Justice Springer's response to this petition that is not part of the motion to disqualify.

We note that Justice Springer's motion to disqualify members of this court is not supported by affidavits as required by NRAP 35(b), nor is it accompanied by proof of service on opposing counsel as required by NRAP 35(d). Further, the motion is not accompanied by "a brief of legal points and authorities, setting forth specifically and under separate headings the legal basis for each ground alleged in the motion or charge," as required by NRAP 35(c). That rule expressly provides that "[f]ailure to present substantial legal authority for any ground [for disqualification of a justice] is a basis for summary denial of the motion or charge, and is a willful violation of this rule." We conclude that the motion the disqualify is procedurally and substantively deficient. Accordingly, we deny the motion.

Finally, we order special investigator Herbert J. Ahlswede to cease any further action or investigation pursuant to the "Order Appointing Special Master" entered in Docket No. 24598, or the other Opinions or Orders filed therein, pending further order of this court, whether compensated for his actions or not. We also direct the clerk of this court, the employees of the clerk of this court and all members of this

court's central legal staff not to assist Ahlswede in his investigation in any manner, including but not limited to the issuance of subpoenas, pending further order of this court.

It is so ORDERED.

/s/ YOUNG, A.C.J.

/s/ SHEARING, J.

/s/ ROSE, J.

cc: Hon. Thomas L. Steffen, Chief Justice
Hon. Charles E. Springer, Justice
Hon. David Zenoff, Senior Justice
Hon. Frankie Sue Del Papa, Attorney General
Herbert J. Ahlswede
Janette M. Bloom, Clerk of the Supreme Court
Michael K. Wall, Supervising Staff Attorney

APPENDIX D

[Filed Jan. 29, 1996]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Case No. 24598
Case No. 27847

NEVADA ATTORNEY GENERAL,
FRANKIE SUE DEL PAPA,
Petitioner,

vs.

THE HONORABLE THOMAS L. STEFFEN, Chief Justice of the Nevada Supreme Court, THE HONORABLE CHARLES E. SPRINGER, Justice of the Nevada Supreme Court, THE HONORABLE DAVID ZENOFF, Senior Justice of the Nevada Supreme Court, in their official capacities and HERBERT J. AHLSWEDE, in his official capacity as Special Investigator,

Respondents.

RESPONSE TO PETITON FOR A WRIT OF PROHIBITION OR IN THE ALTERNATIVE FOR A WRIT OF MANDAMUS

The above-named Respondents, THE HONORABLE THOMAS L. STEFFEN, THE HONORABLE CHARLES E. SPRINGER, THE HONORABLE DAVID ZENOFF, and HERBERT J. AHLSWEDE, in their official capacities only, through their undersigned counsel submit the following

Response to the Petition filed herein in accordance with the Order filed and entered on December 29, 1995.

PRELIMINARY STATEMENT

The Order of December 29, 1995, directing a Response be filed to the Petition herein is obviously void and a legal nullity on its face since it purports to be signed by two justices who have previously been disqualified by voluntary recusal from the underlying case to which the Petition pertains, Whitehead v. Nevada Commission on Judicial Discipline, Case No. 24598 (referred to hereinafter as "the Whitehead case"). The aforementioned disqualified justices are precluded by law and ethics from acting judicially or administratively in any matter which would impact upon the Whitehead case, and therefore have no legal authority to act in this related matter.

Under direction of Justices Rose, Young and Shearing, the Attorney General's "Petition" was given a new case number in an effort to distance the fugitive "Petition" from Case No. 24598. This court has never hesitated to recognize a pleading or filed document for what it truly is, as opposed to what it purports to be by label. In the instant "Petition," it is clear that the entire subject matter contained therein addresses actions, issues, and activities firmly within the exclusive jurisdiction of the constitutionally impaneled court in Case No. 24598. The disqualified justices Rose and Young may not, under guise of a new case number, interject themselves into Case No. 24598 in an effort to overrule its orders and interfere with the lawful processes undertaken by that court.

It is clear black-letter law that a disqualified judge "loses, and must surrender, his jurisdiction, and that thereafter he is without authority to act further in any judicial capacity in connection with the action or proceeding in question, except to make the proper transfer of the case or take the appropriate steps for the selection of another judge. 48A C.J.S. Judges,

§ 155, pp. 860-61. Indeed, as early as 1886, this court recognized and held that when plaintiffs sought an extension of time within which to file amendments to a motion for a new trial from a judge who was disqualified to sit in the same case,

> [t]he application to the judge, who was disqualified, might as well have been made to a stranger having no authority to act. If it had been granted, the order would have been absolutely null and void. Under these circumstances, the case must be treated as if no application had been made for any extension of time to file amendments.

Frevert v. Swift, 19 Nev. 363, 365, 11 P. 273, ___(1886).

As held in Frevert, this "Petition" must be treated by the only constitutional court authorized and empowered to act Case No. 24598, as if it had not been made, as the three justices who have rushed to entertain it, are disqualified to act, and any action they would take would be absolutely null and void. Simply stated, "a rose by any other name is still a rose," and the three justices may not do indirectly what they are prohibited from doing directly.

Aside from the fact that Justices Young and Rose are disqualified in Case No. 24598 and therefore have no authority to act in any way to interfere with the constitutional prerogatives of the duly constituted panel in that case, including any attempt to interfere with the constitutional processes in existence relating to the replacement of members of that court who are not able to continue to serve, there are compelling ethical canons that prohibit the type of chicanery that the disqualified justices are engaging in to maneuver themselves into a position of control in Case No. 24598.

Canon 3B(1) of the Nevada Code of Judicial Conduct (hereinafter all Canon references are to this Code) states that "[a] judge shall hear and decide matters assigned to the judge except those in which disqualification is required. (Emphasis added.) In the instant case, disqualification exists--it is not an issue. Justices Rose and Young are violating this Canon in attempting to perform judicial acts with respect to a case--No. 24598--in which ongoing disqualification is required.

Even if one were to indulge the fiction that the "Petition" in which the three justices seek to act is not inextricably related to Case No. 24598, Justices Rose and Young would clearly be disqualified to act under Canon 3E(1)(c):

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> . . .
>
> (c) the judge knows* that he or she . . . has . . . more than [a] de minimis* interest that could be substantially affected by the proceeding.

Some of the Justices are themselves suspected of being implicated in the violations of law, lawful court orders, and the obstruction and interference with the administration of justice in Case No. 24598. They therefore have a substantial interest in preventing an investigation that could pose a threat I to any aspect of their careers in the judiciary.

Canon 3B(2) provides that "[a] judge shall be faithful to the law* and . . . shall not be swayed by partisan interest, public clamor or fear of criticism." The orders entered by Justices Rose, Young and Shearing in their ongoing efforts to terminate and otherwise interfere with the constitutional

prerogatives of the court in Case No. 24598 demonstrate that they have greater respect for public clamor than the law.

Canon 2 states that "[a] judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities." Canon 2A provides that "[a] judge shall respect and comply with the law* and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

The bedrock principle of American jurisprudence known as the law of the case is, of itself, dispositive of this patent attempt to circumvent the lawful pronouncements and jurisdiction of the duly constituted, constitutional panel of the Nevada Supreme Court in Case No. 24598. Disingenuously declaring that her "Petition. "does not place before the court any substantive issue in Case No. 24598," and that "[i]ndeed, all substantive issues in Case 24598 have long since been decided," she then devotes at least five pages of her "Petition" rearguing the point she raised on behalf of the Nevada Judicial Discipline Commission in Case No. 24598 before she was removed as counsel, to wit, that the orders of the duly constituted court in Whitehead requiring the confidentiality of Whitehead's petition and proceedings based thereon, were illegal and void.

Simply stated, the doctrine of the law of the case is "that principle under which determination of questions of law will generally be held to govern case throughout all its subsequent stages where such determination has already been made on a prior appeal to a court of last resort." Black's Law Dictionary 798 (5th ed. 1979). The constitutional court in Case No. 24598 considered the issue of the confidentiality of pre-probable cause petitions to this court by respondent judges (pursuant to ARJD Rule 40 (7)) at length and held that such confidentiality in this court was mandated by the Nevada Constitution and were not violative of the federal constitution. See Whitehead, 111 Nev. ____, ____, 893 P.2d 866, 884-898

(1995). However disappointed the Attorney General may continue to be in this court's rulings regarding the constitutionality of its orders of confidentiality, the issue has been firmly and finally resolved, and is the law of the case and of this jurisdiction![1]

It is, of course, patently clear why the Attorney General, after declaring that all issues in Case No. 24598 have been put to rest, now tries to enlist the support of two disqualified justices and the lone dissenting justice in the Whitehead cases, to overrule the constitutional court's ruling on the issue of confidentiality. The Attorney General's Petition now seeks a writ directed against the supreme court as it is constituted in the Whitehead case, whereby the court in Case No. 24598 would be deprived of the right to punish as contempt and otherwise, the violations of court orders and court rules.

Moreover, despite the Attorney General's attempt to declare the appointment of a special master by the constitutional panel in Case No. 24598 illegal and void, she again does so contrary to both the law of the case and the clearly lawful authority of the court. In Whitehead III we held, by a majority vote of 4 to 1:

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[1] We also note that the constitutional validity of the duly empaneled court's rulings on the confidentiality of the proceedings before it has received the support of the Board of Governors of the State Bar of Nevada, and the Nevada District Court Judges Association. Indeed, the prestigious American Adjudicature Society also observed, in its amicus brief to Case No. 24598, that under rare circumstances where a discipline commission is functioning as a "rogue commission," extraordinary writ consideration is appropriate, Whitehead V, 893 P.2d at 903, n.28, and that this court "was correct, if it were going to intervene at all, to request the Commission's papers on a confidential basis and to review them in camera." Id. at 900, n.20. The fact that the Attorney General desires to repeat her views to the contrary is of no moment, legally or otherwise.

> A special master shall hereafter be appointed by the court and shall be specially empowered by further and specific order of this court to conduct such investigations shall be necessary to determine the sources of the unlawful breaches of confidentiality that have occurred in these proceedings and the extent to which they may have impacted Petitioner's due process rights.

Concerning the same subject, the court in Whitehead III also declared:

> It is most apparent that someone must get to the bottom of these flagrant constitutional infractions. At this stage of the proceedings we are not prepared, as a court, to launch a full investigation into these matters. Although it is clear that we have the authority to appoint a fact-finding master to delve into the source of the violations, we are not ready at this time to define the scope of activities to be conducted in this regard. We do, however, conclude that an investigation into the breaches of confidentiality is warranted. A master will have to be appointed having the power to issue subpoenas and other compulsory process. In due time the court will issue an order naming the court master or other investigator and defining the scope of the powers and duties that will be necessary to carry out the required investigation.

110 Nev. at 890, 878 P.2d at 923.

In ruling that the court had authority to appoint a fact-finding master, we cited to Young v. Board of County Comm'rs, 91 Nev. 52, 530 P.2d 1203 (1975), which is clearly

supportive of such authority. Moreover, the Attorney General must certainly be aware that statutory authority recognizes the well-established, inherent right of courts to investigate and hold accountable those who violate or are contemptuous of a court's orders. Thus, NRS 1.210 provides: "Every court shall have power . . . [t]o enforce order in the proceedings before it, or before a person or persons empowered to conduct a judicial investigation under its authority." (Emphasis added.)

Our ruling in Whitehead III is now the law of the case, and the time for seeking relief from the ruling through a proper petition for rehearing has long since expired.

Notwithstanding the foregoing, in light of statements made by the court in the Whitehead case, specifically Whitehead v. Nevada Commission on Judicial Discipline, 110 Nev. 128, 139, 869 P.2d 795, ____ (1994), [Whitehead I], concerning compliance with void orders prior to an adjudication of voidness, the Respondents have decided to comply, under extreme protest, with the Order by filing this response, even though the order has no substantive legal validity.

DIRECT RESPONSE TO ALLEGATIONS ENTITLED "STATEMENT OF FACTS"

1. The Respondents admit that on the date alleged, the constitutionally constituted Nevada Supreme Court in Case No. 24598 entered a valid, enforceable order containing the language alleged in paragraph 1.

2. The Respondents deny that the court filed the alleged petition on the Administrative Docket (ADKT), and allege that two strangers to the action, being justices disqualified by law and ethics to act with regard thereto, together with one justice who dissented in the action, filed a fugitive document entitled "Petition" containing the language alleged in paragraph 2.

3. The Respondents deny that the court entered an order on ADKT 221 or made any findings with regard thereto, and allege that on September 15, 1995, a sham proceeding was held by the justice who dissented in the action and two unauthorized persons in which such individuals, without authority to act in any official capacity, purported to make the findings and enter the order alleged in paragraph 3.

4. The Respondents admit that the Special Master, HERBERT J. AHLSWEDE, submitted a Report to the Nevada Supreme Court as constitutionally constituted in Case No. 24598, containing information as to the progress of the investigation he was ordered to undertake, in which he reported that substantial evidence had been discovered indicating the existence of a conspiracy to interfere illegally with the administration of justice and to violate unlawfully the law and specific orders of the Nevada Supreme Court regarding disclosure of material required by law to he kept confidential. Respondents further admit that the Special Master's Report identified the Attorney General or persons on her staff as being involved in such conspiracy and recommended further exploration of such involvement. Respondents deny that the contents of the Special Master's Report were unsupported or "insupportable," and further deny that such allegations and the continued investigation thereof will cause the Petitioner any legally recognizable "injury."

5. Respondents deny that Justices Springer and Steffen individually entered an "Opinion" and allege that the Nevada Supreme Court, as constitutionally constituted in Case No. 24598, filed and entered an Opinion on December 15, 1995, adjudging the fugitive document filed in ADKT 221 on September 15, 1995, to be a nullity and of no legal force and effect. Respondents further admit that the prior orders of the Nevada Supreme Court appointing HERBERT J. AHLSWEDE as Special Master to conduct an investigation as described in such orders, and

granting him the necessary powers and authority to effectively do so, remain in full force and effect. Respondents deny the inflammatory characterization of the authorized investigation as a "fabricated and baseless inquisition" and the characterization of the Special Master's authority as "unbridled". Respondents further deny the allegation that an investigation into unlawful and contemptuous conduct is directed at any "legitimate functions" of the Office of the Attorney General, and deny that such investigation is an interference with constitutionally protected speech of the Attorney General or others. Respondents admit that the scope of the authorized investigation may include interrogation of the members of the staff of the court.

6. Respondents deny the existence of any "competing orders," and deny that any documents purporting to be orders affecting Case No. 24598 that have been filed and entered in any action or proceeding other than Case No. 24598 were filed by "a majority of the Supreme Court". Respondents further deny that a "constitutional crises" has been created by such "competing orders," and deny that the Petitioner has been drawn into any such alleged "crisis" by reason of her office, and allege that a "constitutional crisis" exists by reason of the unlawful efforts of Petitioner and disqualified justices who are constitutionally prohibited from acting in any manner with regard to Case 24598, to abuse the naked power of their respective offices to interfere unlawfully with and obstruct the administration of justice and compliance with the valid and lawful orders entered in Case No. 24598. Respondents deny that Petitioner has any standing on her own behalf or on behalf of the citizens of the State of Nevada to challenge any orders entered in Case No. 24598.

7. The Respondents object to the scurrilous statements contained in paragraph 7 and allege the same to be unworthy of any response. Respondents cannot ascertain the meaning of the allegation referring to "self-destructive maneuvers implicated by the recent activities of the Respondents" and

therefore cannot respond to such meaningless charges. Respondents allege that an attempt to compare the impact of contemptuous and unlawful dissemination of confidential material with the impact of the abuse of official power to obstruct and interfere with the enforcement of lawful orders of the Nevada Supreme Court is immaterial and unnecessary since both types of unlawful conduct are destructive of the integrity of the judicial system.

8. The Respondents deny the allegation that the appointment of HERBERT J. AHLSWEDE as Special Master in Case No. 24598 is "symptomatic" of a crisis on the court. Respondents deny the allegation that authority to act should be restored to elected members of the court who are legally disqualified, and deny the existence of any conflicting valid orders. Respondents deny that the rights of Petitioner or any other persons will be violated by compliance with the lawful orders of the court.

9. Respondents deny that Petitioner is without an adequate remedy at law, deny that the lawfully-ordered investigation by the Special Master is an "inquisitional process," deny that such investigation is an "unconstitutional and unlawful interference with the orderly operation of [Petitioner's] office," and deny that due process or other federal constitutional rights are being violated by the Special Master's investigation. Respondents further deny that the Special Master's investigation constitutes an "abuse of power".

DEFECTS IN THIS PROCEEDING

In addition to their responses to the specific allegations contained in the "Statement of Facts" set forth in the Petition, Respondents further respond that there are inherent defects in this proceeding which require that it be summarily dismissed.

1. The extraordinary writs of mandamus and prohibition are not authorized for the purposes set forth in the Petition.

a. The writ of mandate is specified by NRS 34.160 to "compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station. . . ." The Petition herein does not seek such relief, and there are no allegations that any of the Respondents have failed to perform any duty resulting from their offices as supreme court justices or as Special Master to carry out an investigation. The Petition merely seeks to overrule judicial decisions made in the performance of the duties of the Respondent justices, and to restrain the Special Master from performing the duties enjoined upon him by his appointment.

b. The writ of prohibition is specified by NRS 34.320 to be for the purpose of "arrest[ing] the proceedings of any tribunal, corporation, board or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person". There are no allegations in the Petition in the instant proceeding that the orders entered by the court in Case No. 24598 are without or in excess of the jurisdiction of the court, or that the Special Master has taken any action which is without or in excess of the jurisdiction conferred upon him by the court.

c. The Petition in the instant case only alleges that the decisions rendered by the Nevada Supreme Court in Case No. 24598 are legally erroneous. A plain, speedy and adequate remedy for the making of such allegations and contentions is provided in NRAP Rule 40, authorizing a petition for rehearing. The failure to file a timely petition for rehearing in Case No. 24598 precludes reconsideration of the decisions made in thatcase in any other proceeding.

2. The Petitioner is without standing to prosecute the Petition in the instant case.

a. The Petitioner was not a party to the action, Case No. 24598, to which the instant Petition pertains.

b. The Petitioner, as Attorney General, has no constitutional authority to initiate or prosecute this Petition on behalf of "the citizens of the State of Nevada" as she claims, since there is no existing case or controversy involving the matters set forth in the instant Petition to which the "citizens of the State of Nevada" as a class are parties or in which the Attorney General has been authorized to appear for the "citizens of the State of Nevada" as a class.

c. The Petitioner is directly violating an order of this court by appearing in this action for the purpose of affecting Case No. 24598. In Whitehead v. Nevada Commission on Judicial Discipline, 110 Nev. 874, 890, 878 P.2d 913, ____ (1994) the Nevada Supreme Court specifically ordered:

> 1. The Attorney General andher staff, and Special Deputy Attorney General Donald J. Campbell shall be, and the same hereby are removed as counsel to the Commission in the instant proceeding, and the Attorney General and her staff shall hereafter take no part or assume any role in disciplinary matters brought before the Commission.

(Emphasis added.)

d. The Petitioner, as Attorney General, is constitutionally required to act as counsel for the Respondents when they are sued in their official capacity, thereby creating a direct conflict of interest which precludes her from bringing an action against them.

e. The Petitioner alleges no legally redressable injury to herself in her individual or official capacity which creates a justiciable case or controversy.

3. Procedural defects preclude consideration of the Petition in the instant case.

a. The Petitioner has failed to Join and serve the real parties in interest in the action to which the Petition in the instant case pertains. NRAP Rule 21(a) states in relevant part:

> Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk of the Supreme Court with proof of service on the respondent judge or judges and on all parties to the action in the trial court. . . .

(Emphasis added.)

b. The fact that NRAP refers to the "trial court" further demonstrates that an application for a writ of mandamus or prohibition directed against justices of the supreme court is not authorized by law.

c. The purported order directing a response was not served upon the real parties in interest. NRAP Rule 21(b) states in relevant part:

> The order shall be served on respondents, **all other parties to the action** in the trial court **and all other persons directly affected**. All parties below other than the petitioner shall also be deemed respondents for all purposes.

The real parties in interest in the original proceeding in this court are The Honorable Jerry Carr Whitehead

as Petitioner, and the Nevada Commission on Judicial Discipline as Respondent.

4. The relief sought by the Petition in the instant case is precluded as a matter of law by the doctrines of "law of the case" and "res judicata".

AUTHORITIES IN SUPPORT OF RESPONSE

The purported "Order" of December 29, 1995, directing a response be made to the Petition in the instant case requires the submission of authorities in support of such Response, which are submitted herewith.

A. THE EXTRAORDINARY WRITS OF MANDAMUS AND PROHIBITION ARE NOT APPROPRIATE REMEDIES FOR THE RELIEF SOUGHT BY PETITIONER.

The nature of the extraordinary writs of mandamus and prohibition is that they are directed to inferior tribunals, boards and persons. NRAP Rule 21 specifically contemplates that any application for a writ of mandamus or prohibition against a Judge or Judges refers to a judge or judges of a "trial court". There is no provision in NRAP Rule 21 which authorizes an application for an extraordinary writ against a "Justice". There is no provision in the law which authorizes any court to entertain an application for an extraordinary writ against itself or one of its members. See Jennett v. Stevens, 33 Nev. 527, 111 P. 1025 (1910), wherein the supreme court held that one district judge could not direct a writ of mandamus to another district judge, stating that such a situation is contrary to the principle of the law of mandamus, which presupposes a superior authority to command the doing of a particular act enjoined by law. In the case at bar, the authority of the Respondent justices is equal to the authority of the dissenting Justice, and the disqualified justices have no authority at all.

Therefore, an application for an extraordinary writ is not authorized by law.

Further, an extraordinary writ is not appropriate when there is a plain, speedy and adequate remedy at law. The relief sought in this proceeding is a determination that the orders entered in Case No. 24598 were erroneous. There is no contention that they were without or beyond the jurisdiction of the supreme court, or that in entering such orders, the supreme court failed to perform a duty enjoined upon it by law. Any contentions of error in the making of such orders were addressable by a petition for rehearing pursuant to NRAP Rule 40. No application for a rehearing was made in Case No. 24598, and the time to do so has long expired. There is no provision in the law which empowers the supreme court to rehear or redetermine in a collateral proceeding matters already decided by the court.

The issues raised in the subject Petition should have been raised, if at all, in Case No. 24598, in the form of a petition for rehearing. Such a petition is at present untimely and could not be filed at this juncture. An effort to circumvent the requirements of NRAP Rule 40 by seeking rehearing through an extraordinary writ proceeding is an abuse of the extraordinary writ procedure and is completely unauthorized by law.

B. THE PETITIONER IS WITHOUT STANDING TO INITIATE OR PROSECUTE THIS PETITION.

In order to have standing to prosecute an action, a party must demonstrate an interest and a legally redressable injury, neither of which is shown by the allegations of the Petition in the instant action. The Attorney General of the State of Nevada has not a party to the underlying action, Case No. 24598, and is not aggrieved by the orders which are challenged in the instant Petition.

Although the Attorney General alleges that she is being "injured" in the performance of her duties and in her office by the challenged orders, she does not allege any facts

demonstrating such alleged "injury." The challenged orders direct the conduct of an investigation into unlawful and contemptuous conduct interfering with the administration of justice and the integrity of the supreme court. The Attorney General as a state official is not aggrieved by an investigation into unlawful conduct. If she has personally engaged in unlawful or contemptuous conduct, or if members of her staff have done so, she may suffer consequences by the revelation of such wrongdoing, but that is not an injury for which the law provides a remedy. All persons, including public officials, are expected to be responsible for the consequences of their conduct. It would be contrary to public policy and the interests of justice to permit such a wrongdoer to have standing to use the processes of the court to conceal and coverup such wrongdoing by obstructing and interfering with a lawfully ordered investigation into such conduct.

Although the Attorney General claims to be acting as the "representative of the citizens of the State of Nevada" in bringing this Petition, such mantle has not been bestowed her by the constitution and laws of this State. Her self-anointment - as the spokesman for the citizenry of this State does not confer standing upon her to prosecute a class action petition for an extraordinary writ pertaining to a roceeding to which the "citizens of the State of Nevada" as a class are not a party. Class action proceedings are governed by NRCP Rule 23 which is made applicable to mandamus proceedings by NRS 34.300, and it is clear that the bringing of this proceeding on behalf of the citizens of this State as a class is not authorized.

In addition, the Attorney General is precluded by conflicts of interest from proceeding as Petitioner in this action. The duties of the Attorney General are those prescribed by Law (Nevada Constitution, Art. 5, § 22), and are defined by legislation. (Ryan v. Eighth Judicial District Court, 88 Nev. 638, 503 P.2d 842 (1972)). Included among such duties are the duty to act as counsel to state officials, including supreme court justices, when they are sued in their official capacities. Such duty constitutes a direct conflict of interest precluding the Attorney General from herself bringing an action against justices of the supreme court acting in their official capacities.

See Whitehead v. Nevada Commission on Judicial Discipline, 110 Nev. 874, 884, 878 P.2d 913, ___ (1994), wherein the court stated:

> Another conflict is presented by the fact that the Attorney General is the official legal representative of the judges and justices in this state and cannot, by the nature of that office engage in the prosecution of the very judges that the Attorney General represents as counsel.

Further, as set forth above, the Attorney General is precluded by specific court order entered in Whitehead v. Nevada Commission on Judicial Discipline, from assuming any role in connection with judicial discipline proceedings. As Petitioner herein, she is attempting to affect Case No. 24598, a case involving judicial disciplinary matters brought before the Commission, and the very case in which the order precluding her from assuming that role was entered. The bringing of this Petition may itself be a direct contempt of the supreme court.

C. PROCEDURAL DEFECTS PRECLUDE CONSIDERATION OF THIS PETITION.

The procedural defects set forth in the direct response to the allegations of the Petition above are self-evident and require no further citation of authority other that that already cited in such response. The failure to join and serve the real parties in interest in this proceeding is fatal to the proceeding since they are necessary to an adjudication of the issues raised herein. The motion for an investigation made in Case No. 24598 was made by Petitioner in order to protect rights and interests guaranteed and protected by due process of law. Such motion was granted after extensive briefing and argument in which the Petitioner participated. In addition, the unlawful disclosures of confidential material which are the subject of the investigation directly impact the interests of the members of the Nevada Commission on Judicial Discipline, since they, with others having access to such material, remain as potential suspects in such illegal conduct until and unless

they are cleared by such investigation. They are thus necessary and indispensable parties to this proceeding, (NRAP Rule 21; NRCP Rule 19) and this court, even if otherwise validly constituted (which it is not) would be without jurisdiction to proceed in their absence.

D. ALL ISSUES RAISED IN THE PETITION IN THE INSTANT CASE HAVE BEEN FULLY ADJUDICATED BY ORDERS OF THE SUPREME COURT WHICH HAVE BECOME FINAL.

The Petition in the instant case does not challenge the jurisdiction of the supreme court to issue the challenged orders in Case No. 24598, but rather alleges that such orders violate the constitutionally protected freedom of speech of the Attorney General and others, that such orders arise from an error in imposing confidentiality on the proceedings in Case No. 24598, and that the supreme court is not authorized to appoint a master to conduct a judicial investigation of unlawful and on contemptuous conduct in connection with its proceedings. These issues were all raised and specifically adjudicated in Case No. 24598, in rulings contrary to the position of the Attorney General. In fact that she disagrees with such decisions does not permit her to relitigate them.

The doctrine of "law of the case" requires that decisions finally made in the case become the law of that case for all subsequent proceedings related thereto. The doctrine of "res judicata" requires that issues which have been litigated on their merits between the same parties and which have become final can not thereafter be relitigated. (See Pulley v. Preferred Risk Mutual Insurance Co., 111 Nev. _____, ___ P.2d _____ (Adv. Op. 89, June 27, 1995), discussing the requirements for application of the doctrine of res judicata). In this proceeding, the real parties in interest, although not named, are the same, and the nominal parties were all participants in the original action. The issues now raised in the instant Petition are identical to those decided in Case No. 24598, and such issues were fully briefed, argued and decided on their merits in Case No. 24598. All requirements for the application of the doctrine of res judicata are thus present

herein, precluding any relitigation of such issues in this proceeding.

E. THERE IS ONE SUPREME COURT

The Attorney General does not reach the issue of this case until her conclusion, where she correctly states that there is only one Supreme Court of Nevada. This truth contradicts the petition, which seeks to have the Court divide itself into two parts so that one might overrule the other. The petition rests on the allegation that "Respondents (sic) conduct is in excess of their lawful authority as the orders of secrecy were invalid, and therefore, void." This issue, along with all others raised by the petition, has already been decided by the one and only Nevada Supreme Court. The Attorney General pretends to sue individual members of the Nevada Supreme Court, but she sues the Court itself. She asks for a writ of prohibition to have the single, undivided, Supreme Court reverse its published decision. If the Court were to even consider her petition, it would set a self-destructive precedent. No decision made by a court with substituted Justices could ever be considered final. Indeed, if there is a new "panel" with authority to throw out decisions of an old "panel," any time new robes are fitted, no decision could ever be considered final.

There is no mechanism whereby the Court may reconstitute itself on a case by allowing disqualified Justices to rehear a decision. The present petition asks the Court to do something it has no power to do, seeks to divide it into two parts, seeks to destroy the finality of decisions, seeks to destroy the Court itself, and violates the Attorney General's constitutional duty to avoid conflicts of interest. NRS 281.421(b).

We are presently unable to state with certainty where and to whom the investigation might lead. We do know, however, that the "interim findings" are neither "unsupported" nor insupportable." Assuming that the object is to defend the integrity of the Court in both the short and long terms, there is only one rational decision the Court can make. The Court

must affirm that there is only one Nevada Supreme Court. If, instead, it concludes that its decisions are good only until the robes are hung, it will hang itself.

F. THE PETITION CANNOT BY ADJUDICATED WITH OUT ALLOWING REASONABLE DISCOVERY

The petition alleges that a Nevada Supreme Court majority opinion was the result of personal considerations and in that contempt of court interim findings are "unsupported and insupportable" and are causing Petitioner injury. Petitioner alleges that the investigation is "fabricated and baseless" and interferes with constitutionally protected speech, that the investigation is inquisitorial," that the Respondents are "bent on self-vindication and retribution," and that the investigation is "punitive" and "an unyielding campaign of vengeance". Unverified newspaper stories are cited throughout in support of these allegations.

The petition also rests on the premise that the Petitioner is free of any suggestion of complicity in the actions that are the subject of the investigation and therefore does not have a direct conflict of interest in requesting that the investigation be quashed.[2]

The petition rests on the further premise that all members of this Nevada Supreme Court are free of any suggestion of complicity and would not themselves engage in a conflict of interest by entertaining this petition.
Nevertheless, Petitioner maintains that she presents "purely legal issues" and asks this court to "[e]nter an order setting an expedited scheduling order for briefing and submit the case for decision on the briefs". This contradiction is at the heart

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[2] The aim of the petition is to keep the Attorney General's complicity secret from the people of the State of Nevada, whom she purports to represent in this very petition. The Attorney General complains of "secrecy," but wants it now for herself.

of the matter. Petitioner must have the court accept her allegations and assumptions without discovery, for discovery will reveal them to be untrue. This court could not decide the merits of the petition, assuming it otherwise lawful, without allowing reasonable discovery.

Nevertheless, Petitioner maintains that she presents "purely legal issues" and asks this court to "[e]nter an order setting an expedited scheduling order for briefing and submit the case for decision on the briefs". This contradiction is at the heart of the matter. Petitioner must have the court accept her allegations and assumptions without discovery, for discovery will reveal them to be untrue. This court could not decide the merits of the petition, assuming it otherwise lawful, without allowing reasonable discovery.

Even were there a mechanism for such a collateral challenge to a decision of the court on the ground that the majority opinion was influenced by personal considerations, it could not be sustained by consideration of the bare allegations and newspaper clippings.

The members of this court who recused themselves until. They became subjects of the investigation cannot order the investigation to cease in any event. Were they to go so far as to grant the petition without allowing investigation of the facts that would contradict the petition, they would not only forfeit any pretense of justice and due process of law, but would themselves engage in a conflict of interest of unprecedented magnitude.

G. THE ATTORNEY GENERAL MAY NOT PROSECUTE HERSELF.

The Attorney General maintains that the executive branch, i.e., the Attorney General and the District Attorneys under her supervision, are available to investigate and prosecute the Attorney General and those working with her for contempt of court. This, of course, is absurd. This court has exclusive jurisdiction over contempt of its body, which it may both investigate and decide.

Based upon the foregoing authorities, the Petition in the instant case is not legally cognizable, and should be summarily dismissed.

DISCLOSURES REQUIRED BY ORDER DIRECTING RESPONSE

In addition to requiring a response to the Petition, the purported "Order" filed December 29, 1995, also requires the Respondents to make certain disclosures. The Respondents make such disclosures under extreme protest, since the signatories to such order have no authority to require such disclosure, and such disclosures may be harmful to the continued investigation of the Special Master.

1. Disclosure as to Compensation of the Special Master.

The Special Master was appointed by lawful order of the supreme court and is entitled to be compensated in accordance with such order. However, after the Special Master undertook to commence such investigation in a good faith effort to comply with the mandate of his appointment, his compensation was cut off by a purported Order filed by two justices with no authority to act at all and one justice who dissented from the order of appointment. At that time, the Special Master offered to proceed without compensation, but the Respondents, Thomas L. Steffen and Charles E. Springer, felt it would be unfair and l unjust for him to do so. Said Respondents each advanced $750.00 of their personal funds to the Special Master to compensate him for work already performed, until the State of Nevada honored its financial obligation.

2. Results of Investigation and Evidence Acquired.

The Respondents have heretofore made such disclosures and lodged the evidence with the Clerk of the court.

CONCLUSION

This "Petition," although assigned a different case number, is nothing short of an illegal attempt to overrule critical, substantive rulings in Case No. 24598. As such, it further compounds the ongoing attempts to cover up the most serious of wrongdoings in Case No. 24598. It is a blatant attempt to deprive the citizens of the State of Nevada of their right to know the truth, about Case no. 24598, which truth is vital to maintaining public respect for the judicial branch of government, to preserving the independence of the Nevada judiciary, and to exposing corruption in Nevada government. All Nevada citizens who have an interest in honest government, must surely ask why Petitioner and the three justices (the lone dissenter and the two disqualified justices in Case no. 24598) are so resolutely attempting to thwart and prevent an investigation and revelation of the truth.

Dated: January 29, 1996.

Respectfully submitted,

/s/ CHUCK R. GARDNER
Attorney at Law
815 South Third Street
Las Vegas, NV 89101

APPENDIX E

[Filed May 16, 1996]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Case No. 27847

NEVADA ATTORNEY GENERAL,
FRANKIE SUE DEL PAPA,
Petitioner,

vs.

THE HONORABLE THOMAS L. STEFFEN, Chief Justice of the Nevada Supreme Court, THE HONORABLE CHARLES E. SPRINGER, Justice of the Nevada Supreme Court, THE HONORABLE DAVID ZENOFF, Senior Justice of the Nevada Supreme Court, in their official capacities and HERBERT J. AHLSWEDE, in his official capacity as Special Investigator,

Respondents.

WRIT OF PROHIBITION

TO: The Honorable Thomas L. Steffen, Chief Justice of the Nevada Supreme Court, The Honorable Charles E. Springer, Associate Justice, The Honorable David Zenoff, Senior Justice, and Herbert J. Ahlswede:

WHEREAS, this Court having made and filed its written decision that a writ of prohibition issue,

NOW, THEREFORE, you are directed to cease and desist from any further action in the investigation launched in Supreme Court Case No. 24598 by the appointment of a special master to determine the source of news leaks and the reason for this court's lost prestige.

WITNESS The Honorable S. Cliff Young, Miriam Shearing and Robert E. Rose, Associate Justices of the Supreme Court of the State of Nevada, and attested by my hand and seal this 25th day of April, 1996.

[Seal] /s/ JANETTE M. BLOOM
Supreme Court Clerk

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Case No. 27847

NEVADA ATTORNEY GENERAL,
FRANKIE SUE DEL PAPA,
Petitioner,

vs.

THE HONORABLE THOMAS L. STEFFEN, Chief Justice of the Nevada Supreme Court, THE HONORABLE CHARLES E. SPRINGER, Justice of the Nevada Supreme Court, THE HONORABLE DAVID ZENOFF, Senior Justice of the Nevada Supreme Court, in their official capacities and HERBERT J. AHLSWEDE, in his official capacity as Special Investigator,

Respondents.

RETURN OF SERVICE

STATE OF NEVADA)
) **ss.**
CARSON CITY)

The undersigned, hereby swears, deposes and says: I certify and return that I received the within Writ of Prohibition on the 25th day of April, 1996, and that I personally served the same upon Janette M. Bloom, agent for Chief Justice Thomas Steffen, by showing her an original of the

within and delivering to her a copy of the same in Carson City, Nevada on the 26th day of April, 1996.

/s/ ROBERT PIKE

Subscribed and sworn to before me
this 1st day of May, 1996, by Robert Pike.

[seal]

/s/ MARGARET OSBORNE
NOTARY PUBLIC

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Case No. 27847

NEVADA ATTORNEY GENERAL,
FRANKIE SUE DEL PAPA,
Petitioner,

vs.

THE HONORABLE THOMAS L. STEFFEN, Chief Justice of the Nevada Supreme Court, THE HONORABLE CHARLES E. SPRINGER, Justice of the Nevada Supreme Court, THE HONORABLE DAVID ZENOFF, Senior Justice of the Nevada Supreme Court, in their official capacities and HERBERT J. AHLSWEDE, in his official capacity as Special Investigator,

Respondents.

RETURN OF SERVICE

The undersigned, hereby swears, deposes and says: I certify and return that I received the within Writ of Prohibition on the 25th day of April, 1996, and that I personally served the same upon Janette M. Bloom, agent for Justice Charles Springer, by showing her an original of the within and delivering to her a copy of the same in Carson City, Nevada on the 26th day of April, 1996.

/s/ ROBERT PIKE

Subscribed and sworn to before me
this 1st day of May, 1996, by Robert Pike.

[seal]

/s/ MARGARET OSBORNE
NOTARY PUBLIC

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Case No. 27847

NEVADA ATTORNEY GENERAL,
FRANKIE SUE DEL PAPA,
Petitioner,

vs.

THE HONORABLE THOMAS L. STEFFEN, Chief Justice of the Nevada Supreme Court, THE HONORABLE CHARLES E. SPRINGER, Justice of the Nevada Supreme Court, THE HONORABLE DAVID ZENOFF, Senior Justice of the Nevada Supreme Court, in their official capacities and HERBERT J. AHLSWEDE, in his official capacity as Special Investigator,

Respondents.

RETURN OF SERVICE

The undersigned, hereby swears, deposes and says: I certify and return that I received the within Writ of Prohibition on the 25th day of April, 1996, and that I personally served the same upon Janette M. Bloom, agent for David Zenoff, Senior Justice of the Nevada Supreme Court, by showing her an original of the within and delivering to her a copy of the same in Carson City, Nevada on the 26th day of April, 1996.

/s/ ROBERT PIKE

Subscribed and sworn to before me
this 1st day of May, 1996, by Robert Pike.

[seal]

/s/ MARGARET OSBORNE
NOTARY PUBLIC

APPENDIX F

[Filed Jul. 22, 1993]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Case No. 24598

IN RE PETITION FOR A WRIT OF
PROHIBITION OR IN THE ALTERNATIVE
FOR A WRIT OF MANDAMUS

CONFIDENTIAL ORDER

Petitioner the Honorable Jerry Carr Whitehead having filed a petition for a writ of prohibition or in the alternative for a writ of mandamus directed to the respondent Nevada Commission on Judicial Discipline; and it appearing that petitioner has set forth issues of arguable merit and that petitioner has no plain, speedy and adequate remedy in the ordinary course of law; and good cause appearing therefor;

IT IS HEREBY ORDERED that pending the determination of this petition on its merits, all proceedings before and actions of the Nevada Commission on Judicial Discipline and the actions of those acting on behalf of the Commission relating to this matter, including the filing of an answer to a purported "complaint," the holding of a hearing to determine probable cause, and the conducting of any further investigative activities, are stayed.

IT IS HEREBY FURTHER ORDERED that the Commission shall forthwith, and in any event no later than August 2, 1993, provide to petitioner a list of all persons outside the members of the Commission who have been

contacted by any person purporting to act with the authority of the Commission and advised of the pendency of an "investigation" or "proceeding" against petitioner, and all other matters required to be disclosed pursuant to ARJD 14(5), and to advise each of such persons who may have been noticed to appear at a probable cause hearing that they should not do so pending further notice;

IT IS HEREBY FURTHER ORDERED that the Commission, its members, and all persons purporting to act pursuant to their authority, shall maintain strict confidentiality concerning any alleged investigation or proceeding and the pendency of this action seeking an extraordinary writ in accordance with ARJD 5;

IT IS HEREBY FURTHER ORDERED that all proceedings before this court shall remain strictly confidential, and that the petition and all other documents, exhibits and pleadings related thereto, as well as any further documents submitted for filing in this matter, shall be filed under seal and shall contain the caption as set forth in this order. All documents shall be submitted for filing by delivering them personally to the clerk of this court Janette Bloom or the chief deputy clerk Jeanne Richards.

IT IS HEREBY FURTHER ORDERED the Commission shall have thirty (30) days from the date of this order within which to file an answer, including authorities, against issuance of the requested writ. In the answer, the Commission shall explain the authority by which it has summoned non-complaining witnesses before a finding of probable cause has been made and thereby, of necessity, violating the confidentiality of the proceedings before the Commission.

/s/ STEFFEN, A.C.J.

cc: Hon. Frankie Sue Del Papa, Attorney General
Brooke Nielsen, Deputy Attorney General
Donald J. Campbell
Guy Shipler, Chairman, Nevada Commission on Judicial Discipline

APPENDIX G

AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND JERRY CARR WHITEHEAD

An investigation into alleged acts of wrong doing by Jerry Carr Whitehead has been conducted by the United States; and

Jerry Carr Whitehead has decided to retire from judicial office effective January 15, 1996, and resume the practice of law; he will officially send notice of his retirement within seven (7) days of the date of this document; and

The Government has determined that the interests of justice will be achieved by the decision of Jerry Carr Whitehead to retire from judicial office;

Therefore, in consideration of the representations set forth above, and as a settlement of the issues encompassed within the federal investigation of Jerry Carr Whitehead, it is agreed as follows:

1. The Government will not seek to prosecute Jerry Carr Whitehead for any alleged acts of wrongdoing encompassed within its investigation of Jerry Carr Whitehead of which the Government has notice at the time of the execution of this agreement.

2. The Government has relied upon the representations of Jerry Carr Whitehead that he will retire and, upon retirement, will not seek reelection, and will not serve in any state judicial capacity; in the event that Jerry Carr Whitehead fails to act in accordance with these representations, this agreement shall be null and void, and the Government will be free, in its discretion, to

pursue any action it deems appropriate concerning Jerry Carr Whitehead.

3. Jerry Carr Whitehead expressly agrees that by entering into this agreement he is waiving any rights he would otherwise have had due to the lapse of time between the date of execution of this agreement and January 15, 1997, including any claims to the benefits of any applicable statute of limitations, rights to a speedy trial, or other rights which would accrue to him due to the passage of time.

4. Jerry Carr Whitehead and the United States make no promises of confidentiality of this document.

5. I hereby state that the above has been read and explained to me by my attorney. I understand the conditions of this agreement and I will comply with them.

/s/ JERRY CARR WHITEHEAD — August 14th, 1995 DATE

/s/ MICHAEL G. DOWD
Counsel for JERRY CARR WHITEHEAD — Aug 8, 1995 DATE

/s/ DOUGLAS N. FRAZIER
Special Attorney to the United States Attorney General in the District of Nevada — Aug 7, 1995 DATE

(5)

No. 96-541

Supreme Court, U.S.
FILED
NOV 7 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

In re THE HONORABLE THOMAS L. STEFFEN, Chief Justice, Nevada Supreme Court, and THE HONORABLE CHARLES E. SPRINGER, Associate Justice, Nevada Supreme Court,

Petitioners.

OPPOSITION TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION OR, IN THE ALTERNATIVE, A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

GEOFFREY C. HAZARD, JR.
4025 Chestnut Street
Philadelphia, Pennsylvania 19104
Telephone: (215) 243-1684

BEST AVAILABLE COPY

QUESTIONS PRESENTED

I. Whether Petitioners have presented a federal question.

II. Whether the Court should dismiss the Petition as untimely.

III. Whether the Petition should be denied because Petitioners lack standing to file the Petition.

IV. Whether the Petition should be denied because Petitioners failed to properly raise the issue of judicial disqualification in the state court of last resort.

V. Whether the Petition should be denied because petitioners have failed to allege constitutional grounds requiring the disqualification of Justices Rose and Young.

VI. Whether the Petition should be denied as moot.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

NO. 96-541

IN RE THE HONORABLE THOMAS L. STEFFEN, CHIEF JUSTICE, NEVADA SUPREME COURT, AND THE HONORABLE CHARLES E. SPRINGER, ASSOCIATE JUSTICE, NEVADA SUPREME COURT,
Petitioners

Opposition to Petition for Writ of Mandamus or Prohibition or, in the Alternative, a Writ of Certiorari to the Supreme Court of the State of Nevada

Respondent Justices Robert Rose and C. Clifton Young request that the Court deny the petition for a Writ of Mandamus or Prohibition, or, in the Alternative, for a Writ of Certiorari seeking review of an opinion of the Supreme Court of Nevada. The Nevada Supreme Court opinion was entered in *Del Papa v. Steffen*, and is reported at 920 P.2d 489, filed July 12, 1996. For the convenience of the Court, all citations to Petitioners' appendix will be

to Petitioners' App., and all citations to Respondent Attorney General of the State of Nevada's appendix will be to Respondent Att. Gen.'s App.

STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction pursuant to 28 U.S.C. § 1257(a) because there is no federal question at issue and Petitioners failed to present a federal question for review to the Nevada Supreme Court. The Petition for Writ of Certiorari is not timely and therefore the Court does not have jurisdiction under Supreme Court Rule (Sup. Ct. R.) 13 and 28 U.S.C. § 2101(c) (1995). 28 U.S.C. §1651(a)(1995) is not a grant of jurisdiction and writs in aid of jurisdiction may issue only where this Court may otherwise properly exercise jurisdiction.

OPINION BELOW

In the proceedings below, the opinion granting a writ of prohibition against the Petitioners was entered on April 25, 1996, and is reported at 915 P.2d 245. Petitioners seek review of an opinion filed July 12, 1996, reported at 920 P.2d 489, which reaffirmed the final judgment entered on April 25, 1996.

STATEMENT OF THE CASE

Respondent Justices Robert Rose and C. Clifton Young respectfully oppose the petition for a writ of mandamus or prohibition or, in the alternative, for a writ of certiorari. The petition is flawed in many respects: it fails to present a federal question; it was untimely filed; Petitioners lack standing to sue because they have not suffered a personal injury; Petitioners never formally raised the issue of judicial disqualification in the state court of last resort; Petitioners failed to allege a ground for judicial disqualification which is of constitutional dimension; and

Petitioners' claim is moot. The petition should therefore be denied.

A. Course of Proceedings and the Disposition of the Case Below.

The matter below is a bitter and protracted dispute within the Nevada Supreme Court. The origin of the dispute was an inquiry by the Nevada Commission on Judicial Discipline (Discipline Commission) into the conduct of a trial judge named Jerry Whitehead. Whether Judge Whitehead misbehaved is now moot because he resigned some time ago. Respondent Att. Gen.'s App. G, at 176a. Whether the Discipline Commission misbehaved in investigating Judge Whitehead is now moot because of the judge's resignation. Whether Justices of the Nevada Supreme Court misbehaved in addressing the alleged misbehavior of the Discipline Commission is now moot for the same reason. In any event, the relations *inter sese* of the members of the Nevada Supreme Court are a matter of Nevada law. Despite the contention and confusion, no person was deprived of life, liberty, or property by any judgment below. Hence, there is no matter under 28 U.S.C. §1257 for this Court to consider.

On July 22, 1993, then Nevada District Court Judge Jerry Carr Whitehead petitioned the Nevada Supreme Court for a writ of prohibition or a writ of mandamus directing the Discipline Commission to cease all actions and proceedings against him. Whitehead alleged that the Discipline Commission, which was investigating him for alleged misconduct, was, among other things, violating the Nevada statutory mandate of confidentiality during its investigation. Whitehead requested that all matters in the writ petition be kept confidential. The Nevada Supreme Court granted that request. Respondent Att. Gen.'s App. F, at 174a-175a.

On October 10, 1993, the Las Vegas Review-Journal newspaper reported the existence of the confidentiality order. The newspaper asserted that Justices Steffen and Springer, Petitioners here, had imposed the secrecy order to help Whitehead, who was a political ally of both Justices. Over the next several years, the newspaper repeatedly criticized Justices Steffen and Springer with regard to their participation in the Whitehead case.

On November 16, 1993, Whitehead requested that then Chief Justice Robert Rose disqualify himself from the case for alleged bias in favor of the Nevada Attorney General, who was acting as counsel for the Discipline Commission. Justice Rose initially refused to disqualify himself. Respondents' App. A, at 1a-9a. However, after concluding that the issue of his disqualification would delay the proceedings and shift the focus away from the merits of the case, Justice Rose voluntarily recused himself. Respondents' App. B, at 16a.

Justice C. Clifton Young had voluntarily recused himself at the outset of the case because he had been the Nevada Supreme Court's representative on the Discipline Commission. District Judge Adelliar D. Guy and retired Senior Nevada Supreme Court Justice David Zenoff replaced Justices Rose and Young. These judges joined Justices Tom Steffen, Charles Springer, and Miriam Shearing ("the Whitehead court") to adjudicate the merits of Whitehead's writ petition.

On September 9, 1994, the Whitehead Court by an unpublished order granted Whitehead's writ petition and halted the Discipline Commission's investigation of Whitehead. On February 24, 1995, the Whitehead Court issued a published opinion that basically restated the contents of the unpublished order. *See Whitehead v. Nevada Comm'n on Judicial Discipline*, 893 P.2d 866 (Nev. 1995). Essentially, the opinion stated that the Discipline

Commission did not follow rules of confidentiality and conduct afforded to judges in other investigations when it investigated Whitehead, ordered the Discipline Commission to cease its investigation of Whitehead, and issued directions the Discipline Commission was to follow if it resumed its investigation of Whitehead. Before the Discipline Commission could conduct a new investigation, Whitehead resigned from the bench in order to avoid being prosecuted by the United States Department of Justice. Respondent Att. Gen.'s App G, at 176a.

On September 1, 1995, Justices Steffen and Springer, along with retired Senior Nevada Supreme Court Justice Zenoff and District Judge Guy, entered an order appointing a special master to discover the source of the leak and to investigate the "causes for the loss of public confidence, trust and respect for the Supreme Court and for the judicial system which are related to the [Whitehead case]". Petitioners' App. D, at 85a, 88a. This appointment of a special master was extraneous to the merits of the Whitehead case. Also, Whitehead had by then resigned as a judge.

On September 15, 1995, Nevada Supreme Court Justices Rose, Young, and Shearing issued an order vacating the appointment of the special master. Petitioners' App. B at 7a, 8a. The order stated that expenditure of public funds for the special master required approval of three elected Justices of the court, so that the appointment of the special master in conjunction with two visiting judges was void. On December 15, 1995, Justices Steffen and Springer held that the foregoing September 15, 1995 order filed by Justices Rose, Young, and Shearing was itself void because Justices Rose and Young were disqualified in the original Whitehead case. *Whitehead v. Comm'n on Jud. Discipline*, 908 P.2d 219 (Nev. 1995). This is the contention that Petitioners Steffen and Springer advance in this petition.

On December 21, 1995, Nevada's Attorney General, Frankie Sue Del Papa, then filed a petition to enforce the discharge of the special master. Respondent Att. Gen.'s App. A, at 1a. On December 22, 1995, Justice Springer moved to disqualify Justices Rose, Young, and Shearing from adjudicating the Attorney General's Petition. Respondent Att. Gen.'s App. B, at 131a. Justice Springer's motion was denied because it was not supported by affidavits as required by Nevada Rule of Appellate Procedure (NRAP) 35(b), was not accompanied by proof of service on opposing counsel as required by NRAP 35(d), and was not accompanied by "a brief of legal points and authorities setting forth specifically and under separate headings the legal basis for each ground alleged in the motion or charge" as required by NRAP 35(c). Respondent Att. Gen.'s App. C, at 141a, 142a.

On March 15, 1996, Justices Rose, Young, and Shearing held Justices Steffen and Springer disqualified from adjudicating the merits of the Attorney General's application. Respondents' App. C, at 19a-21a. Justices Steffen and Springer were expressly given the opportunity to file formal motions to disqualify Justices Rose, Young, and Shearing from considering the Attorney General's writ petition; however, no such motions were filed. Respondents' App. C, at 21a. On April 25, 1996, Justice Rose, Young, and Shearing granted the Attorney General's petition. *Del Papa v. Steffen*, 915 P.2d 245 (Nev. 1996). On July 5, 1996, Justices Steffen and Springer filed a two-judge "per curiam" supplemental opinion attempting to void the April 25, 1996 opinion. *Whitehead v. Comm'n on Jud. Discipline*, 920 P.2d 491 (Nev. 1996), *stricken as void*, *Del Papa v. Steffen*, 920 P.2d 489, 491 (Nev. 1996).

On July 12, 1996, Justices Rose, Young, and Shearing filed another opinion expressly reaffirming the September 15, 1995 administrative order and implicitly reaffirming the

April 25, 1996 opinion. *Del Papa v. Steffen*, 920 P.2d 489, 491 (Nev. 1996). Justices Steffen and Springer filed their petition to the United States Supreme Court in response to the July 12, 1996 opinion.

SUMMARY OF ARGUMENT

The Petition does not present a federal question, and therefore there is nothing for this Court to consider pursuant to 28 U.S.C. §1257. The petition is not timely, having been filed approximately 165 days after the final judgment in this matter was filed on April 25, 1996. Petitioners' lack standing to file this petition because they have shown no personal injury to be remedied by this Court. Petitioners have not preserved the issue of judicial disqualification because they failed to present the issue to the Nevada Supreme Court in a formal motion for disqualification pursuant to NRAP 35. Petitioners have not asserted that either Justice Rose or Justice Young had a direct, personal, substantial, and pecuniary interest which this Court in *Aetna* held constitutionally disqualified a judge from adjudicating the case in which he or she had the interest. Finally, Petitioners' claim is moot.

REASONS FOR DENYING THE WRIT

A. No Federal Question is Presented in the Petition.

There is nothing for this Court to address under 28 U.S.C. §1257.

The essential contention of Petitioners is that Justices Rose and Young had a duty under the Due Process Clause of the 14th Amendment to have continued their initial voluntary recusal in this ugly intramural dispute. A fragment of this Court's decision in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), is cited in support of that

contention. At the end of the day in the proceedings below, however, no person was deprived of liberty or property--although the Nevada Supreme Court was deprived of its judicial integrity. If Petitioners Steffen and Springer were "deprived," it was in having decisive weight withheld from their votes in the disputes below. But that deprivation, if it was such, was the resultant of the very Nevada law under which Petitioners claim their right to vote. In any event, if Justices Rose and Young were disqualified for interest at the outset, Justices Steffen and Springer were equally disqualified by the time this matter came to rest below. Accordingly, if there is a federal issue here, it is so exiguous as not to warrant this Court's intervention.

B. The Petition Was Untimely.

A petition for a writ of certiorari to review a judgment of a state court must be filed within ninety days after entry of the judgment sought to be reviewed. Sup. Ct. R. 13(1). The actions complained of, i.e., that Justices Rose and Young improperly reentered the case after they had disqualified themselves, occurred by way of administrative order entered September 15, 1995 by Justices Rose, Young, and Shearing. An administrative order signed by a majority of the Nevada Supreme Court is a final entry of judgment pursuant to Nevada law. *See generally* Nev. Rev. Stat. § 2.140; Nev. Sup. Ct. R. 7(9). Administrative orders are subject to modification by a majority of the court. Nev. Sup. Ct. R. 7(9). Justices Steffen and Springer attempted to modify the administrative order in their December 15, 1995 opinion. However, because their opinion was signed by only two elected Justices of the Nevada Supreme Court, their effort to modify the administrative order was null and void. Nev. Sup. Ct. R. 7(8).

This Court refers to state law to determine the actual effect of a state decision, although state law is not necessarily the controlling factor. *See Cole v. Violette*, 319

U.S. 581, 582 (1943). Under Nevada state law, the unmodified September 15, 1995 administrative order was a final judgment. On this basis, Petitioners' petition was untimely because it was not filed within ninety days of the September 15, 1995 order. If this Court looks beyond Nevada's law to determine the finality of the administrative order, the question is whether the order left "nothing more to be decided" or was an "effective determination of the litigation." *Richfield Oil Corp. v. State Board*, 329 U.S. 69, 72 (1946) (citations omitted). The July 12, 1996 opinion was filed only to prevent Justices Steffen and Springer from filing further documents in the case, and Petitioners have admitted that the July 12, 1996 order only *reaffirmed* the Nevada Supreme Court's September 15, 1995 administrative order and its April 25, 1996 opinion. Pet. brief at 2. On this analysis, the administrative order was a final judgment because it left nothing more to be decided regarding the appointment of the special master and it constituted an effective determination of the matter.

Petitioners, however, argue that they are seeking to vacate the "Mandamus Order" signed by the Nevada Supreme Court on July 12, 1996. However, the opinion granting the petition for mandamus was filed on April 25, 1996. Assuming that the September 15, 1995 administrative order was not a final judgment, this April 25, 1996 opinion was. The July 12, 1996 supplemental opinion in no way modified the April 25, 1996 opinion. This Court has concluded that a state supreme court's disposal of a writ of prohibition is a final judgment reviewable in the United States Supreme Court. *Madruga v. Superior Court*, 346 U.S. 556, 557 n.1 (1954). Because the April 25, 1996 opinion disposed of the writ petition, left "nothing more to be decided," and constituted an "effective determination of the litigation," it was a final judgment. *Richfield Oil Corp.*, 329 U.S. at 72.

Additionally, this Court stated in *Federal Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952) that

> the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only where the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.

Id. at 211-12.

Petitioners have acknowledged that the July 12, 1996 opinion is no more than a reaffirmation of the court's holdings in the September 15, 1995 administrative order and the April 25, 1996 opinion. Pet. brief at 2. Furthermore, the July 12, 1996 opinion did not disturb or revise any legal rights and obligations which had been plainly settled with finality in the court's April 25, 1996 opinion. Therefore, the time to file the writ did not begin to run anew on July 12, 1996, and the instant petition, filed 165 days after the April 25, 1996 opinion, was time-barred because it was not filed within ninety days of the court's final judgment rendered on April 25, 1996.[1]

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[1]Furthermore, the July 12, 1996 opinion also was not issued upon (continued...)

C. Petitioners Lack Standing to File the Petition.

A petitioner must have standing to challenge the action to be adjudicated. *Valley Forge College v. Americans United*, 454 U.S. 464, 471 (1982). To establish standing, a petitioner must "'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" *Id.* at 472 (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)). The injury must be "'an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.'" *United States v. Hays*, ___ U.S. ___, ___, 115 S.Ct 2431, 2435 (1995) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Claims grounded in "generalized grievances" are inadequate. *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

Petitioners fail to articulate a personal, particularized, imminent injury upon which standing can be based. Petitioners assert that

> By ignoring the most elemental requirements of due process to decide a case they are disqualified to adjudicate, the Respondent members of the Nevada Supreme Court have heaped ignominy upon the State's judicial system. The nationwide system of justice governed by the Fourteenth Amendment's Due Process Clause cannot permit such a "decision to stand."

Pet. brief at 3 (citation omitted).

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[1](...continued)
rehearing; therefore, the time limits to file an action commenced on April 25, 1996, and not on July 12, 1996. Sup. Ct. R. 13(3).

Petitioners do not identify who has been "deprived of life, liberty, or property without due process of law" by virtue of the September 15, 1995 administrative order or the April 25, 1996 opinion granting the Attorney General's writ petition. Justices Steffen and Springer, either individually or collectively, have not alleged a personal deprivation of life, liberty, or property without due process of law, and Petitioners' claim of injury to "the nationwide system of justice" does not satisfy the standing requirements. *Valley Forge*, 454 U.S. at 471.

Petitioners further argue that this case involves "the right of the public to a properly constituted . . . court." Pet. brief at 25. However, this Court has held that "even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499. Petitioners have articulated no injury specific to themselves.

D. Petitioners Never Properly Raised the Issue of Whether Justices Rose and Young Were Disqualified from Hearing the Attorney General's Petition for Writ of Mandamus in the Nevada Supreme Court.

The Attorney General's writ petition named Justices Steffen and Springer as parties and asked the members of the Nevada Supreme Court to enjoin them from entering any more decisions regarding the appointment of the special investigator. On March 15, 1996, Justices Young, Rose, and Shearing filed an order disqualifying Justices Steffen and Springer from considering the merits of the Attorney General's writ petition because the Justices were named parties and Nevada law does not permit named parties to consider the merits of their own cases. Respondents' App.

C, at 19a, 20a. The order permitted Justices Steffen and Springer to file formal motions to disqualify Justices Rose, Young and Shearing, yet no motions to disqualify were ever filed.

This Court will not review a question that has not been "pressed or passed upon" by the courts below. *United States v. Williams*, 504 U.S. 36, 41 (1992). The "usual formulation is: 'It is only in exceptional cases coming [to the United States Supreme Court] from the federal courts that questions not pressed or passed upon below are reviewed.'" *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (quoting *Duignan v. United States*, 274 U.S. 195, 200 (1927)). Because this case is appealed from a state court of last resort, the issue must have been pressed or passed upon in the state court of last resort.

Furthermore,

> it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the [Supreme] Court will not undertake to review it.

Williams v. Kaiser, 323 U.S. 471, 477 (1945) (citations omitted); *see Street v. New York*, 394 U.S. 576, 581-82 (1969).

Only in Justice Springer's December 22, 1995 motion to disqualify Justices Rose, Young, and Shearing was it alleged that the Due Process Clause of the United States

Constitution would be violated if they adjudicated the merits of the Attorney General's writ petition. However, the order denying Justice Springer's motion stated that the motion was denied because it failed to conform with the state rules for filing a motion to disqualify a judge, as discussed above; the order did not address the alleged due process violation. Therefore, the federal due process question was not necessary to the determination of the motion to disqualify, the issue was not "pressed or passed on" by the Nevada Supreme Court, and this Court should not undertake to review it.

Additionally, NRAP 35(a) states that any ground for disqualification or recusal of a supreme court justice that is not raised in a timely manner through the filing of a formal motion or charge shall be waived. Because Petitioners never filed a formal motion to disqualify Justices Young and Rose based on either Justices' alleged biases or prejudices, and never moved for rehearing based upon that allegation, Petitioners waived this issue and the Supreme Court should not consider the merits.

E. The Alleged Bias Asserted by Petitioners Does Not Present an Issue of Constitutional Concern.

Petitioners' brief cites *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), for the proposition that a judge who is disqualified from a case can not return to the case at a later date. However, petitioners ignore the threshold of the *Lavoie* analysis, which is whether the alleged basis for disqualification is of constitutional dimension and therefore a proper subject for this Court to consider.

In *Lavoie*, this Court stated that not "'[a]ll questions of judicial qualification . . . involve constitutional validity.'" *Id.* at 820 (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)). The *Lavoie* court also stated that "only in the most

extreme cases would disqualification on [the basis of general allegations of bias and prejudice] be constitutionally required." *Id.* at 821; *see also FTC v. Cement Institute*, 333 U.S. 683, 702 (1948) (stating that "most matters relating to judicial disqualification [do] not rise to a constitutional level").[2]

In *Lavoie*, the Court concluded that allegations of Justice Embry's general biases against insurance companies were insufficient to raise any constitutional violations. *Lavoie*, 475 U.S. at 821. However, the Court concluded that Justice Embry had a direct, personal, substantial, and pecuniary interest in the outcome of the case and therefore in substance had acted as a judge in his own case. *Id.* at 824.

In the instant case, there was never any finding or admission of bias against any party by either Justice Young or Justice Rose. Furthermore, Petitioners' brief does not suggest how the alleged biases or prejudices of Justices Young and Rose are "direct, personal, substantial, [and] pecuniary interests." *Id.* Petitioners identify no interests that constitutionally required Justices Rose and Young to be disqualified from adjudicating the merits of the Attorney General's writ petition.

---

[2]In a previous decision rendered in the merits of the Whitehead case, the Discipline Commission attempted to disqualify Justices Steffen and Springer due to the fact that Justices Steffen and Springer had an alleged financial and personal interest in the case. *Whitehead v. Comm'n on Jud. Discipline*, 873 P.2d 946, 974 (Nev. 1994). In denying the Discipline Commission's motion to disqualify, Justices Steffen and Springer engaged in the same analysis of *Lavoie* presented here, i.e. that not all questions of judicial disqualification rise to a constitutional level and that a direct, personal, substantial, pecuniary interest must be proven for a due process violation to exist. *Id.* at 975.

F. Petitioners' Claim Should Be Dismissed as Moot.

Judge Whitehead has resigned and gone on with his life; the Discipline Commission has proceeded with other business; the special master has ceased to function; the supposed leak from the Discipline Commission has long since become public knowledge. The intramural dispute in the Nevada Supreme Court has come to rest. All the elements of mootness are present.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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(6)

No. 96-541

Supreme Court, U.S.
FILED
NOV 7 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

In re THE HONORABLE THOMAS L. STEFFEN, Chief Justice, Nevada Supreme Court, and THE HONORABLE CHARLES E. SPRINGER, Associate Justice, Nevada Supreme Court,

Petitioners.

APPENDIX TO OPPOSITION TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION OR, IN THE ALTERNATIVE, A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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APPENDIX A

[Filed Dec. 8, 1993]

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 24598

IN RE PETITION FOR A WRIT OF PROHIBITION OR IN THE ALTERNATIVE FOR A WRIT OF MANDAMUS

RESPONSE OF CHIEF JUSTICE ROSE TO MOTION TO DISQUALIFY HIM

COMES NOW, Justice Robert E. Rose, and sets forth his opposition to Judge Jerry Carr Whitehead's motion to disqualify him in this case. The basis of the response is that Chief Justice Rose feels no express or implied bias in favor or against either of the parties or their attorneys, and thus has a duty, pursuant to Nevada law, to resist attempts at disqualification. The grounds for disqualification cited by Judge Whitehead have no relationship to this case and are totally insufficient to state a claim for disqualification.

Judicial Conduct. Id. at 651, 653, 764 P.2d at 1300, 1303. Judge Whitehead participated in this decision as a district court judge.

Six months later, the Nevada Supreme Court reaffirmed the principles set forth in the Goldman decision when it decided Ainsworth v. Combined Insurance Co., 105 Nev. 237, 774 P.2d 1003 (1989). In that case, the Supreme Court had reinstated a punitive damages award of $6,000,000, and a petition for rehearing and a motion to disqualify former Chief Justice Elmer (Al) Gunderson were filed, based upon Gunderson's participation in the previous decisions in the case. Combined Insurance Co. asserted numerous facts that it claimed showed actual or implied bias or the appearance of bias or prejudice against Combined by Gunderson, including:

> 1. Gunderson openly ridiculed Combined's attorney in court, and referred to him as a "loser" or "losing lawyer" approximately 130 times in Gunderson's response to a motion to disqualify. See Response of E.M. Gunderson to Purported "Motions Belatedly Filed by Respondent" filed February 24, 1989.
>
> 2. Remarks by Gunderson at the hearing showed a clear animus toward Combined and the entire insurance industry. Ainsworth, 105 Nev. at 256, 774 P.2d at 1017.
>
> 3. Gunderson had considered extrajudicial, post-opinion material. Id. at 258, 774 P.2d at 1018.
>
> 4. Gunderson admitted to entering the case with a preconceived negative impression of Combined's counsel. Id.

5. The opposing attorney had acted as the campaign manager for Gunderson in one of his campaigns for the Nevada Supreme Court, and this attorney had also represented Gunderson's wife in a previous unrelated venture. Id. at 260, 261, 268, 774 P.2d at 1020, 1025.

6. In an unrelated case, attorney Laura FitzSimmons was representing Gunderson personally and had filed an amicus brief on behalf of the Nevada Trial Lawyers Association supporting Ainsworth and opposing Combined's position. Id. at 265, 266, 774 P.2d at 1023, 1024.

This is the same Laura FitzSimmons who now appears as one of the attorneys for Judge Whitehead.

In spite of these facts, the court held that the contentions were wholly insufficient to establish any disabling bias or a reasonable inference of impropriety. Id. at 269-270, 774 P.2d at 1026.

In the instant matter, the Clark County District Attorney found that Chief Justice Rose had committed no criminal acts, and the Attorney General concurred in that conclusion. Chief Justice Rose was aware of the pending charges against him less than two weeks prior to the Attorney General's decision, and the Attorney General's decision simply confirmed the District Attorney's action taken on a "no merit" case. If the facts established in the Goldman and Ainsworth cases were insufficient to establish any express or implied bias against Young, Steffen, or Gunderson, there are certainly insufficient facts in this case to infer any express or implied bias by Chief Justice Rose against Judge Whitehead or favoritism for the Commission.

The Nevada Supreme Court has also held that the attitude of a judge toward the attorney for a party is largely irrelevant. "Generally, an allegation of bias in favor of or against counsel for a litigant states an insufficient ground for disqualification because it is not indicative of extrajudicial bias against the party." Ainsworth, 105 Nev. at 259, 774 P.2d 22 at 1019. Judge Whitehead's attorneys claim that Chief Justice Rose owes some implied favor to the Attorney General, the attorney for the Commission on Judicial Discipline. But, following the clear language of Ainsworth, any perceived feelings toward or against a party's attorney generally is insufficient grounds for disqualification of a jurist. See also In re Petition to Recall Dunleavy, 104 Nev. 784, 769 P.2d 1271 (1988). As stated in Dunleavy:

> In a small state such as Nevada with a concomitantly limited bar membership, it is inevitable that frequent interactions will occur between the members of the bar and the judiciary. Thus, allegations of bias based upon a judge's associations with counsel for a litigant pose a particularly onerous potential for impeding the dispensation of justice.

Id. at 790-91, 769 P.2d at 1275; see also Ainsworth v. Combined Insurance Co., 105 Nev. 237, 774 P.2d 1003 (1989). The Court also noted that if a litigant could successfully challenge a judge based upon such allegations of bias against counsel for the litigant, "it 'would bid fair to decimate the bench' and lawyers, once in a controversy with a judge, 'would-have a license under which the judge would serve at their will.'" Dunleavy, 104 Nev. at 790, 769 P.2d at 1275 (citing Davis v. Board of School Com'rs of Mobile County, 517 F.2d 1044, 1050 (5th Cir. 1975)); see also Ainsworth, 105 Nev. at 259, 774 P.2d at 1019. To permit a justice or judge to be disqualified on the basis of bias for or against a litigant's counsel would permit manipulation

of the court and significantly impede the judicial process and the administration of justice.

II

THE MOTION TO DISQUALIFY FAILS TO MEET REQUIREMENTS OF RULE 35 OF THE NEVADA RULES OF APPELLATE PROCEDURE

Rule 35 of the Nevada Rules of Appellate Procedure was added in 1990 by this Court, and it provides more stringent requirements for the disqualification of a justice than existed when the Goldman and Ainsworth cases were decided. Specifically, the rule states that any motion to disqualify "must not claim or suggest ostensible facts that are neither established by proper averments in the supporting affidavits nor by the record of the case." See NRAP 35(a). Other than Chief Justice Rose's meeting with Rex Bell and the fact that the Attorney General concurred with the conclusion of the District Attorney that no criminal violation had been committed by Chief Justice Rose, the remaining "facts" asserted by Judge Whitehead are irrelevant or do not support a reasonable inference of favoritism toward the Attorney General's office.

Further, Rule 35 specifically states that once a justice has participated in a contested matter, he or she may be removed only for fraud or illegal conduct. "In no event will the supreme court deem timely any motion or charge seeking the disqualification or recusal of a justice who has heard argument upon, or otherwise considered, any contested matter in the cause, except as to grounds based on fraud or like illegal conduct of which the challenging party had no notice until after the contested matter was considered." NRAP 35(a). It is conceded by the Clark County District Attorney and the Attorney General that no violation of law was committed by Chief Justice Rose. Further, Judge Whitehead's attorneys concede as much

when they say that their motion for disqualification is based upon "appearances." See Motion to Disqualify Justice filed November 16, 1993, at 25. Chief Justice Rose signed the September 2, 1993, order that decided several contested matters and set oral argument on the case for October 4, 1993, in addition to other contested matters in which Chief Justice Rose has participated. Therefore, Judge Whitehead's motion to disqualify Chief Justice Rose is generally deficient because it presents no facts that establish actual bias or favoritism by Chief Justice Rose for or against any party, and specifically because it fails to set forth any facts that constitute fraud or illegal conduct by Chief Justice Rose after he has heard and decided a contested matter.

III

THE CHIEF JUSTICE IS GIVEN THE ADMINISTRATIVE AUTHORITY TO ASSIGN DISTRICT COURT JUDGES TO CASES THROUGHOUT NEVADA

The Nevada Constitution provides as follows:

> 1. The chief justice is the administrative head of the court system. Subject to such rules as the supreme court may adopt, the chief justice may:
>
> . . . .
>
> (b) Assign district judges to assist in other judicial districts or to specialized functions which may be established by law.

Nev. Const., art. 6 § 19. The chief justice is the administrative head of the Nevada court system and has the express authority to assign district judges to other judicial districts. When the chief justice makes such an assignment and a conflict of interest arises, he also has the inherent power to remove the district judge creating the conflict or

to appoint another district judge in his place and stead. The Nevada Supreme Court has recognized that the chief justice has the authority to administer the court system in Nevada, In re Petition to Recall Dunleavy, 104 Nev. 784, 769 P.2d 1271 (1988); Goldman v. Bryan, 104 Nev. 644, 653-54, 764 P.2d 1296, 1302 (1988), and Chief Justice Rose did nothing more than that which he was authorized and had the responsibility to do.

Therefore, Chief Justice Rose respectfully requests that the motion to disqualify him in this case be denied. DATED this 8th day of December, 1993.

/s/ Robert E. Rose

AFFIDAVIT OF ROBERT E. ROSE

STATE OF NEVADA)
: ss.
CARSON CITY)

COMES NOW, Robert E. Rose, and being duly sworn deposes and says:

1. In early 1992, District Court Judge Jerry Carr Whitehead requested that I write a letter of recommendation for him to support his effort to be appointed the next Federal District Court Judge in Nevada. I have known Judge Whitehead for twenty-five years and have always considered him a friend. On February 7, 1992, I wrote to Congresswoman Barbara Vucanovich recommending Judge Whitehead for that position. A true and correct copy of that letter is attached to this response. As can be seen from the letter, I hold District Judge Whitehead in very high regard and strongly recommended him for this position.

2. On November 8, 1993, I received a demand letter from Judge Whitehead's attorneys demanding I disqualify myself from his case because of a conversation I had with Clark County District Attorney Rex Bell concerning a former law clerk, Rhonda Mushkin, and the subsequent review of the matter by the Nevada Attorney General. This demand surprised me because of its harsh accusatory language from the attorneys representing someone I had always considered a friend.

3. I met with Rex Bell on or about December 9, 1992, and talked with him briefly about the search warrant executed at Rhonda Mushkin's home. Excerpts of that conversation have been reported, and I do not believe there is need for further elaboration at this time, except to say that I asked Rex Bell to do nothing improper, but in effect,

to do his job which he assured me he would. He has publicly indicated that he felt no undue influence or pressure from my inquiry.

4. Several weeks after my meeting with Rex Bell, I was contacted by detectives with the Las Vegas Metropolitan Police Department who wanted to talk to me about that meeting. I told them I would be glad to, and I met with them the next time I was in Las Vegas. At this interview with the detectives, I explained what I had said to Rex Bell as best I could recollect and why I was concerned about the case against Rhonda Mushkin. I had no idea at that time that my conversation with Rex Bell had been recorded. I told the detectives to contact me if they needed any additional information from me. They said they would.

5. I heard nothing about criminal charges being asserted against me by the Las Vegas Metropolitan Police Department until the very end of October or the beginning of November, 1993. On November 4, 1993, Jon Ralston informed me that the Las Vegas Metropolitan Police Department had claimed that I committed several violations of law subsequent to my meeting with Rex Bell, that the District Attorney's office had concluded that there was insufficient evidence to support any claim of criminal wrongdoing, and that the case had been sent to the Attorney General's office for review out of an abundance of caution. Jon Ralston's column concerning this matter appeared in the Las Vegas Review-Journal the next day, November 5, 1993.

6. On November 8, 1993, the Attorney General's office issued a letter agreeing with the District Attorney's office that I had committed no violation of the law. Although I was surprised that anyone was claiming that I had committed a violation of law, the action taken by the District Attorney's office and the Attorney General's office

was certainly what I expected, these claims of my violating the law having no merit. Therefore, I was aware of possible criminal charges being asserted against me for less than two weeks before the Attorney General's opinion. It is my understanding that the Attorney General's opinion concludes the matter and there is no further claim of violation of the law being made against me concerning the Rhonda Mushkin prosecution. I feel no favoritism toward nor animus against the Attorney General's office or its client, the Nevada Commission on Judicial Discipline. In my view, the Attorney General has been doing her job in reviewing the claims that I violated the law and also in representing the Nevada Commission on Judicial Discipline.

7. One of the attorneys for Judge Whitehead suggests in the motion to disqualify that the Mushkin matter and my participation in the Whitehead case is causing a serious crisis of public confidence in the integrity and independence of our judicial system. This allegation is too foolish for words. I would suggest, though, that the attorneys for Judge Whitehead are truly creating such a crisis by their "rambo-style" litigation practices, their "win at all costs" tactics, and their absolute refusal to recognize the legitimate authority of the Nevada Commission on Judicial Discipline given it by the Nevada Constitution and the people of Nevada. The integrity of the Nevada Commission on Judicial Discipline must be protected and its role in judicial discipline respected.

8. On August 24, 1993, I issued an order removing Judge Jerry Carr Whitehead from any further action in the Shearing v. Towbin case, which case Judge Whitehead had voluntarily assumed the month before while sitting as a visiting district court judge in Clark County, Nevada. I did this pursuant to the express power given to the chief justice by the Nevada Constitution as the administrative head of the Nevada court system and the power to assign district court judges to various cases throughout the state. The

facts giving rise to this order began when I, as chief justice, received a request from the Eighth Judicial District Court (Clark County) to assign Judge Jerry Carr Whitehead to hear a case entitled Fields v. Mosley. The order I signed assigning Judge Whitehead to this case also stated that he could handle "other matters as time permits."

9. It is the practice to ask a visiting district court judge to handle additional matters that cannot be handled by local judges because of conflicts of interests and the like, if time permits. I am informed and believe, and on information and belief state, that cases in addition to the Mosley matter were placed on the calendar for Judge Whitehead on July 15 and 16, 1993, including a case entitled Steven P. Shearing v. Daniel L. Towbin, Case No. A298149, the plaintiff being Dr. Steven Shearing, the husband of Justice Miriam Shearing. When sitting in Las Vegas on July 15 and 16, 1993, apparently Judge Whitehead did not realize that Dr. Steven Shearing was the husband of Justice Miriam Shearing and that his handling of that case might present a conflict of interest when he filed his confidential petition for a writ of mandamus one week later, which began the action in question on July 22, 1993. I am further informed and believe, and on information and belief state, that Judge Whitehead took no formal action in the Shearing case except to consider some preliminary motions and conduct a settlement conference.

10. When I received a document entitled "Request for Voluntary Recusal of Justice [Shearing], filed by one of Judge Whitehead's attorneys, I was alerted to this potential conflict created by Judge Whitehead's acting as the district judge in the Shearing case and then filing a petition with this Court where Dr. Shearing's wife sits as a justice. To eliminate any potential conflict, I removed Judge Whitehead from any further involvement or action on the Shearing case pending in district court. I did this because it is far easier to eliminate a conflict by removing a district court judge

and reassigning the case to another (there are forty-six district court judges in Nevada), rather than disqualifying a justice of this Court when there are only five in this state. Judge Whitehead could have recused himself from the Shearing case and removed the conflict of interest by his own action. He chose not to do that, but rather requested Justice Shearing remove herself.

It has been reported that Judge Whitehead abhors it when a peremptory challenge is lodged against him by parties, because he is of the belief that this is judge shopping, even though it is permitted by the rules of the Nevada Supreme Court. It is ironic that, in this case, the attorneys for Judge Whitehead attempted to remove Justice Shearing and are attempting to disqualify me, and thereby are doing essentially what their client abhors, judge shopping by attempting to remove the justices they perceive may not be persuaded by their arguments. True and correct copies of the orders involving the Fields v. Mosley and Shearing v. Towbin cases are attached to this response, these orders having been filed on June 28, 1993, and August 24, 1993, along with the "Request for Voluntary Recusal of Justice" filed by the attorneys for Judge Whitehead on August 23, 1993.

11. The Nevada Attorney General serves as the attorney for state governmental agencies and on many occasions serves as the attorney for the Nevada Supreme Court and its justices. The Attorney General has just concluded representing this Court and its justices in a suit filed by inmates who have received the death penalty claiming that our death penalty guidelines (Rule 250 of the Supreme Court Rules) are unconstitutional. In addition to this matter, the Attorney General represents the Court and justices on numerous other lawsuits by defendants and third parties. Therefore, I do not find it unusual that the Attorney General was designated by the Legislature to provide assistance and representation to the Nevada

Commission on Judicial Discipline. The Attorney General has served as the Commission's attorney without objection from this Court for the past five years when Justices Springer and Young have served as members of the Commission.

12. I have no bias or favoritism toward either of the parties in this case or their attorneys and deny any such alleged facts or inferences to the contrary. Feeling this way, I have no other alternative but to resist disqualification as required by Nevada law.

/s/ Robert E. Rose

Subscribed and Sworn to before me
this 8th day of December, 1993.

/s/ Vickie Roberts
Notary Public

APPENDIX B

FOR IMMEDIATE RELEASE JANUARY 14, 1994

Chief Justice Bob Rose's Statement
Regarding the Judge Whitehead Case

"After intense consideration, I am voluntarily removing myself from the case involving Judge Jerry Whitehead and the Nevada Commission on Judicial Discipline in the hope to refocus the debate on the real issues in the case and to expedite a decision.

"This was a difficult decision, but it is in the best interests of the citizens who count on me. To keep faith with Nevadans as Chief Justice, I must ensure that justice is swift as well as sure. The legal maneuvering orchestrated by Judge Whitehead's battery of lawyers could have dragged the issue of my disqualification out for months--allowing Judge Whitehead to dodge the fair hearing the public has a right to expect. By stepping aside, this matter will be more quickly decided. The timely handling of cases is, itself, an important aspect of justice--particularly in cases involving public officials.

"Despite having been cleared of any wrongdoing by the Nevada Attorney General's Office and the Clark County District Attorney, I have been the object of attacks by the four attorneys Whitehead hired to defend him.

"This case is about getting to the bottom of very serious charges involving the misconduct of Judge Whitehead that has been presented to the Nevada Commission on Judicial Discipline by many complaints, including those filed by two fellow District Court Judges and the Washoe County District Attorney. Judge Whitehead claims the Commission has no authority to hear the complaints against him filed

with the Commission and has petitioned the Nevada Supreme Court to prevent the Commission's inquiry into his conduct and to dismiss the complaints against him. I want to return the focus to where it belongs--on the misconduct allegations pending against Judge Whitehead.

"By stepping aside in this case, the matter that is critical to the citizens of Washoe County will be more quickly decided. The timely handling of cases is, itself, an important part of justice--particularly in cases involving public officials.

"My philosophy has been that the Nevada Supreme Court should give great deference to the Nevada Commission on Judicial Discipline--a body added to the Nevada Constitution by the people of Nevada. While the Nevada Supreme Court has the authority to review preliminary orders of the Commission as well as its final result, any preliminary review should be done by this Court swiftly and with deference to the Commission. I regret that I will not be able to bring this philosophy to the final deliberations in this case.

"But, my participation in the Whitehead case is not essential. No judge is indispensable. What is essential is the proper functioning of the Nevada Commission on Judicial Discipline with each complaint decided promptly, impartially, and on the real issues presented.

"The motion to disqualify me does not state any ground for my disqualification. But, my voluntary recusal will make it possible for the Nevada Supreme Court to reach a final decision quickly and to refocus attention on the real issue--Judge Whitehead's misconduct and the legitimate authority of the Nevada Judicial Discipline Commission. These are the reasons why I am now voluntarily recusing myself from this case.

"I urge my fellow Justices to move as quickly as possible on this case."

APPENDIX C

[Filed March 15, 1996]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Case No. 27487

NEVADA ATTORNEY GENERAL FRANKIE SUE DEL PAPA,

Petitioner,

vs.

THE HONORABLE THOMAS L. STEFFEN, Chief Justice of the Nevada Supreme Court, THE HONORABLE CHARLES E. SPRINGER, Justice of the Nevada Supreme Court, THE HONORABLE DAVID ZENOFF, Senior Justice of the Nevada Supreme Court, in their official capacities and HERBERT J. AHLSWEDE, in his official capacity as special investigator,

Respondents.

ORDER

This case names two justices of this court as parties, Chief Justice Thomas Steffen and Justice Charles Springer. It was assumed by the undersigned that pursuant to Nevada law and the Nevada Code of Judicial Conduct that these two justices would acknowledge their automatic disqualification and voluntarily recuse themselves from this case. However, both justices have not recused themselves, and public statements have been made indicating that they do not consider themselves automatically disqualified.

To determine the basis for the claim that these two justices are not disqualified, the remaining three elected justices wrote to them. The response gave no clear answer to the question but asked a number of questions in response. See Correspondence File, Case No. 27847.

It is obvious that this case is not the same case as Whitehead v. Comm'n on Jud. Discipline, Docket No. 24598. Both the parties and the issues in the two cases are different. Further, it is equally obvious that pursuant to Nevada law and the Nevada Code of Judicial Conduct, Chief Justice Steffen and Justice Springer are statutorily disqualified from sitting or otherwise participating in this case. NRS 1.230(2)(a) states that:

> A judge shall not act as such in an action or proceeding when implied bias exists in any of the following respects:
>
> (a) When he is a party to or interested in the action or proceeding.

For the last 100 years, Nevada cases considering a statutory disqualification have held that any action taken by a judge who is disqualified by statute is void and invalid. Hoff v. District Court, 79 Nev. 108, 378 P.2d 977 (1963); Frevert v. Swift, 19 Nev. 363, 11 P. 273 (1886). It is beyond dispute that any action that could possibly be taken by Justices Steffen or Springer in this case would be invalid and void.

The Nevada Code of Judicial Conduct also disqualifies a justice who is a party in a case. Canon 3E(1)(d)(i) states that a judge shall disqualify himself when he "is a party to the proceeding . . . ." We recently held that court rules governing professional conduct have the force of law for those to whom they apply. See Shimrak v. Garcia-Mendoza, 112 Nev. ___, ___ P.2d ___ (Adv. Op. No. 35, March 5, 1996). By both Nevada law and the Nevada Code of

Judicial Conduct, Justices Steffen and Springer are automatically disqualified from participation in this case.

IT IS HEREBY ORDERED that Chief Justice Thomas Steffen and Justice Charles Springer are automatically disqualified from participation in this case pursuant to NRS 1.230(2)(a) and Nevada Code of Judicial Conduct Canon 3E(1)(d)(i) because of their status as named parties in the action. Any motions to disqualify any of the remaining justices or other issues the parties want to present to the court may be filed in this case and shall be determined in the ordinary course.

/s/ YOUNG, J.

/s/ SHEARING, J.

/s/ ROSE, J.

Supreme Court, U.S.
FILED
NOV 28 1996
CLERK

No. 96-541

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

IN RE THE HONORABLE THOMAS L. STEFFEN, CHIEF JUSTICE, NEVADA SUPREME COURT, and THE HONORABLE CHARLES E. SPRINGER, ASSOCIATE JUSTICE, NEVADA SUPREME COURT,

Petitioners

On Petition for a Writ of Mandamus or Prohibition or, in the Alternative, a Writ of Certiorari to the Supreme Court of the State of Nevada

---

REPLY TO OPPOSITIONS TO PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION OR, IN THE ALTERNATIVE, FOR A WRIT OF CERTIORARI

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Robert L. Stern et al., Supreme Court Practice, 275 (7th ed. 1993)	3, 4

INTRODUCTION

The Oppositions filed by Respondent Justices Robert Rose and C. Clifton Young (hereafter, "Rose Opp.") and Attorney General Frankie Sue Del Papa (hereafter, "Del Papa Opp.") raise a host of procedural objections to deflect the Court from the gravity of this case. Petitioners purportedly failed to seek disqualification of Justices Rose and Young in a "different case." Del Papa Opp. i, 19-20; Rose Opp. 12, 14. Respondents also assert the Petition is untimely (Del Papa Opp. 21-24; Rose Opp. 8-10), is moot (Rose Opp. 16), fails to establish standing (Del Papa Opp. 15-19; Rose Opp. 11-12), and does not present a substantial federal question. Del Papa Opp. 10-15; Rose Opp. 7-8, 14-15. These submissions are meritless.

I. THE *DEL PAPA* PETITION IS NOT SEPARATE FROM *WHITEHEAD* AND JUSTICES YOUNG AND ROSE ARE DISQUALIFIED FROM PARTICIPATION IN THAT CASE

The Oppositions assert the challenged writ was not entered in *Whitehead*. Del Papa Opp. i; Rose Opp. 1, 12-14. The Attorney General even submits she did *not* seek " 'to vacate a substantial portion of the rulings and relief entered in *Whitehead*,' " calling that assertion a "misstatement." Del Papa Opp. 8 (quoting Pet. 3). Respondents then argue that (1) Justices Rose and Young are not disqualified in the Attorney General's "different" proceeding and (2) the Justices' disqualification, in any event, was "waived." Del Papa Opp. i, 19-20; Rose Opp. 12-14. This dispute, however, is *not* a "different case" from *Whitehead* (Del Papa Opp. i)—a case in which Justices Rose and Young *are* recused.

The Attorney General's writ petition (App. J (attached)) shows on its face that it is not "different" from *Whitehead*. The only named respondents are the judges who ruled against her in *Whitehead*. App. J 279a. The only relief she seeks is an order "mandating that the Respondents cease all action in [*Whitehead*]." *Id.* at 280a. The "Statement of Facts" merely recites the background of *Whitehead*. *Id.* at 280a-283a. In fact, the only ground for

issuance of the writ is the Attorney General's contention that (Pet. App. 117a):

> the September 15, 1995 order entered by this court [*i.e.*, the disqualified Justices' order vacating the appointment of the Special Master] is competing with the December 15, 1995 opinion entered by the *White head* panel [*i.e.*, the court opinion vacating the September 15, 1995 order], thus creating a constitutional crisis which the [Attorney General] has been drawn into by virtue of her office.

The Attorney General, in short, simply asked the Nevada Supreme Court to alter the orders and relief entered in *Whitehead*. In granting that request (Pet. App. 1a), the disqualified Justices unquestionably vacated " 'a substantial portion of the rulings and relief entered in *Whitehead*.' " Del Papa Opp. 8 (quoting Pet. 3); *see* Pet. 16-19. Indeed, the disqualified Justices terminated *Whitehead* by ordering the clerk on July 12, 1996 "to accept no [further] filings." Pet. App. 5a.

Accordingly, the only distinction between the disqualified Justices' direct participation in *Whitehead* and their issuance of the disputed orders is one of mere nomenclature: the Attorney General attempted to create a new caption for the *Whitehead case*. There is, therefore, no merit to Respondents' claims that the Respondent Justices are not disqualified or that their disqualification was "waived" by procedural irregularities. Del Papa Opp. 19-20; Rose Opp. 12-14. When the disqualified Justices reversed various *Whitehead* rulings and terminated the case on July 12, 1995 (Pet. App. 1a), they were already disqualified in that matter.[1]

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[1] Respondents assert that their recusal was "voluntary" and imply that it was even unnecessary. *E.g.*, Rose Opp. 4. But, as set out in the Petition, there were good grounds indeed for disqualifying the Justices from considering a challenge to judicial disciplinary procedures. Pet. 8 n.2. *Compare* grounds for Justice Rose's recusal (being "secretly recorded * * * telling the district attorney that he would 'love' to see the criminal charges pending against two friends, one a business associate, 'go away' ") (Pet. 8 n.2) *with Nixon v. United States*, 506 U.S. 224, 226 (1993) (federal judge

Respondents, finally, assert (without explaining the significance of the assertion) that Chief Justice Steffen and Associate Justice Springer are "disqualified" from ruling on the Attorney General's petition for the simple reason that they are named as respondents. Rose Opp. 12. Respondents err. The Attorney General's petition is nothing more than a motion for relief in *Whitehead* and Petitioners are *not* disqualified in *Whitehead*. Furthermore, the argument that Petitioners are disqualified because the Attorney General sued them is extremely dangerous. The well-established rule throughout the country is that litigants may not "stack the judicial deck" by the naive expedient of suing a judge who has ruled against them, asking for reversal, and then asserting that the defendant judge is disqualified. Pet. App. 152a-155a (citing copious authority). *In re Ronwin*, 680 P.2d 107, 117 (Ariz.), *cert. denied*, 464 U.S. 977 (1983) (disqualification should not be put "in the hands of the most unscrupulous").

II. THE PETITION IS TIMELY

Any claim that the Petition is untimely (Del Papa Opp. 21-24; Rose Opp. 8-10) is vacuous. There is no time period for filing extraordinary writs and the Petition (in any event) was filed within 90 days of the final action of the disqualified Justices.

The Petition seeks extraordinary relief. "There are no time limitations specified in statute or rule for filing in the Supreme Court an application for one of the extraordinary writs, such as mandamus, prohibition, habeas corpus, or common-law certiorari." Robert L. Stern et al., Supreme Court Practice 275 (7th ed. 1993). *See* 28 U.S.C. § 1651 (1994); Sup. Ct. R. 20; *Hicks v. District of Columbia*, 383 U.S. 252, 253 (1966) (Douglas, J., dissenting).

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impeached for accepting "a gratuity * * * in exchange for asking a local district attorney to halt the prosecution of [a] businessman's son"). *See also* Pet. 20 n.7 (once disqualified, even erroneously recused judges may not reenter case).

And, even if subjected to certiorari limits,[2] "an examination of the entire record" shows the Petition is timely. *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 72 (1946). The Petition was filed within 90 days of the July 12, 1996 order. Pet. App. 1a. That order—which reentered previously vacated rulings—is the appropriate point from which to calculate the certiorari period.[3] In *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-212 (1952), the Court explained that reentry of a judgment restarts the 90-day period "when the lower court * * * resolves a genuine ambiguity * * * in a judgment previously rendered." The test "is a practical one." *Id.* "The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." *Id.* The July order meets this test.

The September 15, 1995 order (which the disqualified Justices assert was their "final" order, Rose Opp. 8) was vacated by three of the four members of the *Whitehead* panel (Pet. App. 92a)—not, as Respondents erroneously assert, by an order of "Justices Steffen and Springer." Rose Opp. 5.[4] The April 25, 1996 writ of prohibition, in

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[2] If a petition for extraordinary relief is filed, the Court may "convert[] [the] petition * * * into a petition for certiorari" and "disregard the certiorari time limitations." Stern et al., *supra*, at 275.

[3] *Wilkins v. United States*, 441 U.S. 468, 470 (1979) (90 days run from reentry of vacated decision; Court directs vacation and reentry of judgment to permit timely certiorari petition); *Schreiner v. United States*, 404 U.S. 66, 67 (1971) (same); *Hill v. Hawes*, 320 U.S. 520, 523-524 (1944) (same).

[4] Justices Rose and Young erroneously assert that the September 15, 1995 "administrative order" is only "subject to modification by a majority" of "elected Justices of the Nevada Supreme Court." Rose Opp. 8. The rules of the Nevada Supreme Court, however, nowhere require action by a majority of the "elected" Justices. Rather, Nevada Supreme Court Rule 7(8) allows a majority of the court to void an administrative order. The September 15, 1995 "administrative order" was voided by a majority of the Nevada Supreme Court. Pet. App. 92a.

turn, was vacated "because of the federal and Nevada requirements of due process" by a July 5, 1996 order of the Nevada Supreme Court. Pet. App. 160a. Accordingly, the disqualified Justices' orders were not "final" until all decisions vacating those orders were set aside on July 12, 1996. Pet. App. 1a.

The July 12, 1996 order, therefore, "resolve[d] a genuine ambiguity." *Minneapolis-Honeywell*, 344 U.S. at 211. Until that date, it was not clear what "legal rights and obligations * * * had been plainly and properly settled with finality." 344 U.S. at 212. The July order—and only the July order—plainly (although not properly) disposed of *Whitehead*. The Petition is timely.

III. *WHITEHEAD* IS NOT MOOT

Respondents contend the Petition is moot because "Judge Whitehead has resigned," the "Special Master has ceased to function," and the "intramural dispute in the Nevada Supreme Court has come to rest." Rose Opp. 16. These claims do not demonstrate mootness.

Although Judge Whitehead has retired, the proceeding he filed before the Nevada Supreme Court is not moot. Judge Whitehead requested—and obtained—an order appointing a Special Master to investigate the source of the devastating breaches of confidentiality surrounding his judicial disciplinary proceeding. Pet. App. 9a. The Special Master was appointed to "determine the sources of the unlawful breaches of confidentiality that have occurred in these proceedings" and "the extent to which they may have impacted [Judge Whitehead's] due process rights." Pet. App. 28a. Judge Whitehead (and the Nevada Supreme Court) retain a live interest in the completion of this task.[6] *See* Judge Whitehead's Motion for Leave to Intervene as Petitioner at 1-3, No. 96-829 (filed Nov. 21, 1996).

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[6] *In re Glancey*, 542 A.2d 1350, 1353 (Penn. 1988) ("Where other issues remain for adjudication," a judicial disciplinary action is not rendered moot when a judge resigns); *In re Weeks*, 658 P.2d 174, 176 (Ariz. 1983) (*en banc*) (a judge's resignation does not render a disciplinary proceeding moot when deciding the case could aid

The Special Master, furthermore, has "ceased to function" and the matter has "come to rest" (Rose Opp. 16) only because of the disqualified Justices' unconstitutional order. The Special Master states in his interim report that he "still harbor[s] some hope that [he] might be allowed to continue in the search for truth." Pet. App. 107a. Relief from this Court will permit the Special Master's search to continue. Accordingly, the Petition presents the Court with a live controversy. *Powell v. McCormack*, 395 U.S. 486, 496-497 (1969) (a single live issue "suppl[ies] the constitutional requirement of a case or controversy").

IV. PETITIONERS HAVE STANDING TO LITIGATE THE CONSTITUTIONAL INVALIDITY OF THE MANDAMUS ORDER ENTERED AGAINST THEM

According to Respondents, the Attorney General has filed—and the disqualified Justices have decided—a remarkable suit: one absolutely immune from review for constitutional error. Petitioners purportedly have no "personal, particularized, imminent injury upon which standing can be based." Rose Opp. 11. But, if Petitioners lack such injury, *no one* named in the Attorney General's pleading has standing because all of the respondents suffered the same wrong: unlawful termination of a court order. Standing doctrine does not mandate this absurd result.

Petitioners have not presented a "generalized grievance[]" (Rose Opp. 11, quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)) nor an "abstract' question." Del Papa Opp. 15 (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982)). On the contrary, Petitioners have claimed a precise, concrete, and actual injury: the unconstitutional issuance of a writ of prohibition restraining their performance of judicial duties. Pet. App. 132a (writ directs Petitioners "to cease and desist from

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state officials in carrying out their duties in the future). *Cf. Lavoie*, 475 U.S. at 823 n.2 (Court decides disqualification issue even though the disqualified jurist had "retired from the court for health reasons").

any further action in the investigation launched in [*Whitehead*]"). This direct, personal command vests Petitioners with standing to raise its constitutional invalidity.

Indeed, the Court has routinely recognized that judges subjected to an extraordinary writ are proper litigants in proceedings reviewing the propriety of the writ. As noted in *Ex parte Fahey*, 332 U.S. 258, 260 (1947), one of the "consequence[s]" of an extraordinary writ is that it "mak[es] the judge a litigant." *Accord, LaBuy v. Howes Leather Co.*, 352 U.S. 249, 258 (1957) (extraordinary writs "place[] trial judges in the anomalous position of being litigants"). Once a judge becomes a "litigant," he may seek review of the writ issued against him. *E.g., Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661 (1978).[6] It is far too late in the day to contend seriously that judges lack "standing" to raise the impropriety of an extraordinary writ.[7]

As stated in *Valley Forge*, whatever the difficulties of standing doctrine, "of one thing we may be sure: those who do not possess Art. III standing may not litigate as suitors in the courts of the United States." 454 U.S. at 475-476. Judges subjected to an extraordinary writ have historically—and regularly—"litigate[d] as suitors" before this Court. *Id.*; note 6, *supra*. They unquestionably have "Art. III standing." 454 U.S. at 476.[8]

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[6] *See also Will v. United States*, 389 U.S. 90, 91-92 (1967); *Van Dusen v. Barrack*, 376 U.S. 612, 614-615 (1964); *Parsons v. Chesapeake & Ohio Ry. Co.*, 375 U.S. 70, 71 (1963); *Hoffman v. Blaski*, 363 U.S. 335, 337-338 (1960); *United States v. Lawrence*, 3 U.S. (3 Dall.) 42 (1795); *Parker and another against the Judges of the Circuit Court of Maryland*, 25 U.S. (12 Wheat.) 561 (1827); *Ex Parte Bradstreet*, 32 U.S. (7 Pet.) 634 (1833); *Ex Parte Hennen*, 38 U.S. (13 Pet.) 230 (1839); *Ex parte Wall*, 107 U.S. (17 Otto) 265 (1883).

[7] None of the standing cases cited by Respondents (*e.g.*, Del Papa Opp. 16-18) involve an appeal of a writ of mandamus issued against a judge. They are, therefore, inapposite.

[8] Standing is also established by analogy to cases that accord legislators standing to maintain the effectiveness of their votes. Respondents admit that Petitioners—at the very least—have suffered the injury of "having decisive weight withheld from their

V. THE QUESTION PRESENTED IS SUBSTANTIAL AND DEMANDS THE COURT'S ATTENTION

Contrary to the unsupportable submission that "[t]he federal question * * * was never raised" below (Del Papa Opp. 14) (*accord*, Rose Opp. 13-14), the constitutional impropriety of the disqualified Justices' action was forcefully brought to their attention. Pet. App. 160a ("The two disqualified Justices are also disabled from action in [*Whitehead*] * * * *because of the federal and Nevada requirements of due process*") (emphasis added); *id.* at 163a ("the opinion and writ issued by the [disqualified] Justices on April 25, 1996 * * * was entertained and entered without due process of law" and is "therefore void"). These references to the demands of due process—made during extended discussions of *Lavoie* (Pet. App. 155a-163a)—unequivocally raised the Question Presented.[9]

The Question Presented, furthermore, is *substantial*. Although Respondent Del Papa asserts *Lavoie* "says nothing about whether [recused judges] * * * can return to the case at a later stage" (Del Papa Opp. 11) and the Respondent Justices argue that no issue of "constitutional" disqualification is involved (Rose Opp. 14-15), neither contention has merit.

Lavoie has *much* to say about whether a once-recused judge "can return to the case at a later stage." Del Papa

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votes in the disputes below." Rose Opp. 8. This injury is quite sufficient to establish standing. In *Coleman v. Miller*, 307 U.S. 433 (1939), the Court concluded that when legislators' votes "have been overridden and virtually held for naught * * * [they] have a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Accord, Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974) (Senator has standing when his vote has "been nullified"). The votes of Petitioners "have been overridden and virtually held for naught" by the disqualified Justices. *Coleman*, 307 U.S. at 438. Because the Due Process Clause prohibits disqualified judges from casting the deciding vote (*Lavoie*, 475 U.S. at 827-28), Petitioners have "a right and privilege under the Constitution of the United States to have their votes given effect." *Coleman*, 307 U.S. at 438. Petitioners, in short, have standing.

[9] *Street v. New York*, 394 U.S. 576, 584 (1969) (question need only be raised " 'with fair precision and in due time' ") (quoting *New York v. Zimmerman*, 278 U.S. 63, 67 (1928)).

Opp. 11. *Lavoie* establishes beyond peradventure the constitutionally required remedy for a disqualified judge's disposition of a case: vacation. This Court emphasized that "we are aware of no case, and none has been called to our attention, permitting a court's decision to stand when a disqualified judge casts the deciding vote." 475 U.S. at 827-28. Rather than a mere "fragment" (Rose Opp. 7), this constitutional remedy is the heart of *Lavoie*.

Moreover, although the Respondent Justices are already disqualified and need not be recused again, even if it were necessary to establish their "constitutional" bias (Rose Opp. 14-15), such bias is evident. A mere 13 days after the Special Master uncovered evidence of wrongdoing on the part of the Attorney General and the disqualified Justices (Pet. App. 211a, 251a),[10] the disqualified Justices purportedly terminated the Special Master's investigation (Pet. App. 7a) and did not rest until they had finally achieved that result. Pet. App. 1a. When sitting Justices of a State's highest court have not only re-entered (and decided) a case in which they are already disqualified, but have done so after evidence of their own possible wrongdoing has become public, the federal question is anything but "exiguous." Rose Opp. 8. It is overwhelmingly important.

This Court long ago "recognized that, under the Due Process Clause, no judge 'can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome.' " *Lavoie*, 475 U.S. at 822 (quoting *In re Murchison*, 349 U.S. 133, 136 (1995)). The disqualified Justices, who must regularly face reelection,[11] unquestion-

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[10] Among other things, the Special Master discovered that a *Whitehead* brief had been faxed improperly by the Attorney General's office to a Nevada lawyer (Pet. App. 211a), who had numerous contacts with the Nevada press (Pet. App. 229a-230a) and who met "with Justice Rose at about the time that the first newspaper articles began appearing concerning the Whitehead matter." Pet. App. 251a.

[11] Nev. Const. Art. 6, § 3. Justice Young's incentive for thwarting the investigation was especially high as he was in a reelection

ably have a direct, personal and pecuniary interest in preventing the continuation of an investigation that has uncovered evidence—and might well produce indisputable proof—of their contempt for orders emanating from their own court.

CONCLUSION

The Petition does not present an "intramural dispute" that can be appropriately disregarded. Rose Opp. 16. Petitioners invoke the Court's aid in enforcing a " 'principle of justice so rooted in the traditions and conscience of our peoples as to be ranked as fundamental' " (*Lavoie*, 475 U.S. at 821 (*quoting Patterson v. New York*, 432 U.S. 197, 201-202 (1977)): the due process axiom that judgments cannot stand if there is "a possible temptation to the average [judge not] * * * to hold the balance nice, clear and true.' " *Lavoie*, 475 U.S. at 822 (*quoting Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)). The entire confidence of the People of Nevada in the fundamental fairness of their judicial system lies in the hands of the Court. Absent intervention, Nevada litigants will understandably conclude that state judges may not only reenter matters in which they are recused, but may decide cases in which they have a personal stake.

The Respondent Justices have not offered any justification for their frank disregard of due process but, instead, have raised a litany of meritless technical barriers. Sections I-V, *infra*. The reason why is plain: there *is* no constitutionally cognizable justification for their action. The Court should summarily issue a writ vacating the July 12, 1996 order and direct Justices Robert Rose and C. Clifford Young to refrain from directly or indirectly modifying the rulings made or relief entered in *Whitehead*, including any actions interfering with the appointment of necessary replacement judges.

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campaign this year. The 1996 campaign was unusually close; he was reelected by a three percent margin and received only 41 percent of the total vote. Pet. App. K (attached) at 286a (Unofficial Election Returns, Nevada Secretary of State).

Respectfully submitted,

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November 29, 1996

APPENDICES

APPENDICES

APPENDIX J

[Filed Dec. 21, 1995]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Case No. 27847

NEVADA ATTORNEY GENERAL, FRANKIE SUE DEL PAPA,
Petitioner,

vs.

THE HONORABLE THOMAS L. STEFFEN, Chief Justice of the Nevada Supreme Court, THE HONORABLE CHARLES E. SPRINGER, Justice of the Nevada Supreme Court, THE HONORABLE DAVID ZENOFF, Senior Justice of the Nevada Supreme Court, in their official capacities and HERBERT J. AHLSWEDE, in his official capacity as Special Investigator,
Respondents.

PETITION FOR A WRIT OF PROHIBITION
OR IN THE ALTERNATIVE FOR A WRIT
OF MANDAMUS

The Petitioner, Attorney General Frankie Sue Del Papa, hereby petitions this Honorable Court, pursuant to NRS 34.150, *et seq.*, NRS 34.320, *et seq.* and NRAP 21 for issuance of a Writ of Prohibition or in the alternative for a Writ of Mandamus prohibiting and/or mandating that the Respondents cease all action in Supreme Court Case No. 24598 and in particular all action in furtherance of the unlawful and unconstitutional investigation directed against the Petitioner and numerous unnamed individuals identified by Respondent Herbert F. Ahlswede, Special Master of the "Whitehead Court" (hereinafter Respondent Ahlswede), appointed by Respondent Justices on September 1, 1995.

Petitioner further requests the Court to enter an order immediately staying such proceedings pending its ruling

on the merits of this petition. Petitioner alleges, as is more particularly described below, that Respondent Justices, by taking any further action in Case No. 24598 and by appointing and directing the Respondent special investigator to investigate Petitioner and others, and by proceeding with such investigation in violation of the order of a majority of this Court, are exceeding their lawful jurisdiction and that such actions are subject to a writ of prohibition. In the alternative Petitioner requests that this Court issue a Writ of Mandamus directing Respondents cease all action in Case No. 24598 and discharge special investigator, Herbert R. Ahlswede from conducting any further investigatory or prosecutorial activities pursuant to the Respondents' September 1, 1995, ORDER APPOINTING SPECIAL MASTER.

I. STATEMENT OF FACTS

1. On September 1, 1995, Respondents Steffen and Zenoff signed and filed an order in Supreme Court Case No. 24598, purporting to appoint Respondent Ahlswede to investigate the sources of press stories about *Whitehead v. Comm'n on Judicial Discipline,* Supreme Court Case No. 24598 and to inquire "into the causes for the loss of public confidence, trust and respect for the Supreme Court and for the judicial system. . . ." *See* Exhibit A attached.

2. On September 7, 1995, this Court filed a petition on the administrative docket of the court, ADKT 221, noting that there is no express authority for a panel to appoint a special prosecutor/investigator and no authority to expend funds in this regard without a vote of a majoriy of the elected supreme court justices. The petition asked the Court to consider entering an order vacating the appointment of the special investigator. *See* Exhibit B attached hereto.

3. On September 15, 1995, this Court entered an order in ADKT 221 in which it found that appointment of the special master in Case No. 24598 exceeded the panel's jurisdiction and purported to authorize the expenditure of

public funds. The Court further found that the appointment of a "special master/investigator" and concomitant expenditure of funds serves no legitimate purpose and amounts to a gross waste of this court's limited resources." *See* Exhibit C attached hereto.

The Court voided the order appointing the special master and prohibited the payment or any costs or related expenditures.

4. Respondent Justices have received a confidential document styled "MASTER'S INTERIM REPORT" in which the Petitioner and/or members of her staff are identified as having been a party or parties to "an intentional and knowing disclosure of confidential matters relating to the Whitehead matter before the Judicial Discipline Commission," that a statement attributed to Petitioner by a former member of the Attorney General's office purportedly made by Petitioner during a staff meeting "should be explored." Respondent Ahlswede's unsupported and insupportable allegations have caused and will continue to cause Petitioner injury unless the activities of Ahlswede authorized by Respondent Justices are stayed pending a determination of the merits of this petition and relief in the nature of a Writ of Prohibition or in the alternative Mandamus is entered by this Court following a determination of the merits of this petition.

5. On December 15, 1995, the Respondents Steffen, Springer and Zenoff entered an Opinion in Case No. 24598, which adjudged an order of the Court dated September 15, 1995, to be a nullity and of no legal force or effect. *See* Exhibit D attached hereto. The September 15, 1995, order signed by Justices Young, Rose, and Shearing had rendered the Respondents' appointment of Ahlswede void. The Respondents have attempted to reinstate the unconstitutional and unlawful appointment of Ahlswede and have confirmed, adopted and unleased the unbridled authority on the part of Respondent Ahlswede to pursue a fabricated and baseless inquisition into the legitimate functions of Petitioner's office, the constitutionally protected

speech of Petitioner and of private individuals and to engage in an interrogation of the members of the Court itself.

6. The competing Orders of September 15, 1995, and December 15, 1995, entered by Respondent Justices in Case No. 24598 and by a majority of the Supreme Court have created a constitutional crisis which the Petitioner has been drawn into by reason of her office. Petitioner submits that she has standing on her own behalf as well as the status she has as the duly elected and acting legal representative of the citizen's of the State to complain of Respondents unprecedented action in commissioning Ahlswede's activities, by acting as investigators, prosecutors and judges in a single action, and by refusing to obey an order issued by a majority of the duly elected justices of this Court.

7. Any supposed leaks of information from a case which under state law and court rules should have been open to the public pales in comparison to the self-destructive maneuvers implicated by the recent activities of the Respondents.

8. The Ahlswede appointment which Respondent Justices have attempted to reinstate, in the face of a Supreme Court order signed by a majority of the duly elected justices, dissolving the appointment is symptomatic of a crisis on the court. Unless and until the lawfully constituted authority of this Honorable Court is restored to the majority of the elected members of the Court and the conflicting orders of the Court are reconciled by the relief requested herein, Petitioner's and others rights will be violated, and subjected to conflicting and inconsistent directives concerning an extra judicial inquisitorial process.

9. Petitioner is without an adequate remedy at law in this matter. The inquisitorial process which Respondents have initiated will subject her and others to an unconstitutional and unlawful interference with the orderly operation of her office, a denial of due process and violations of federal constitutional rights. There is no forum except

this Court in which the Petitioner can presently seek relief by way of prohibition or mandamus from the Respondents' abuses of power which are set forth herein. Under these circumstances, the elected members of this Court must correct the unconstitutional and unlawful investigation that Respondents have created.

II. RELIEF SOUGHT

WHEREAS, Petitioner prays this Court:

1. Stay all actions of Respondent Justices Steffen, Springer and Zenoff in Case No. 24598 and by Respondents Special Master Ahlswede which have been authorized by Respondent Justices pending determination of this Petition on its merits.

2. Enter an order setting an expedited scheduling order for briefing and submitting the case for decision on the briefs.

Petitioner further prays for a Writ of Prohibition or in the Alternative a Writ of Mandamus restraining Respondent Justices from taking any further action in Case No. 24598 and restraining Respondent Special Master Ahlswede from proceeding with any further activities of an investigatory or prosecutorial nature involving the Petitioner or members of her staff on the basis of the Respondent Justices order of September 1, 1995, styled ORDER APPOINTING SPECIAL MASTER. Petitioner prays for further relief which the Court may deem appropriate in this matter.

DATED this 20th day of December, 1995.

/s/ Frankie Sue Del Papa
FRANKIE SUE DEL PAPA
Attorney General
State of Nevada
State Bar No. 192
Capitol Complex
Carson City, Nevada 89710
(702) 687-3510

VERIFICATION

STATE OF NEVADA)
) ss:
CARSON CITY)

I, FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada, do hereby under penalties of Perjury the following is true:

1. I am the petitioner in the above-named action.

2. I have read the foregoing petition for a Writ of Prohibition or in the Alternative for a Writ of Mandamus and know the contents thereof and that the same are true of my own knowledge, except as to those matters stated to be upon information and belief, which matters I believe to be true.

DATED this 20th day of December, 1995.

/s/ Frankie Sue Del Papa
FRANKIE SUE DEL PAPA
Attorney General
State of Nevada
State Bar No. 192
Capitol Complex
Carson City, Nevada 89710
(702) 687-3510

SIGNED AND SWORN TO before me this 20th day of December 1995, by FRANKIE SUE DEL PAPA.

/s/ Reba Coombs
REBA COOMBS
Notary Public

APPENDIX K

1996

UNOFFICIAL

General Election Returns

This is the unofficial abstract of the votes cast at the November 5, 1996, General Election in the State of Nevada.

[STATE SEAL]

Compiled by

Dean Heller

Secretary of State

Supreme Court Justice, Seat D (Nonpartisan)								
Jones, Steve	6,649	2,335	89,859	4,884	4,005	153	216	1,396
Young, Cliff	7,089	2,848	91,632	5,780	4,869	195	243	1,891
"None of these candidates'	3,884	2,067	42,302	3,839	2,728	153	175	977

669	767	3,265	798	3,143	528	529	34,961	1,140	155,257
923	561	3,629	924	3,549	691	626	40,715	1,208	166,872
508	347	2,225	515	1,854	289	427	24,372	690	87,352